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LEADING ARTICLES

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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR ASSOCIATION

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RELATION OF THE MUNICIPAL CORPORATION TO THE STATE

By Kenneth P. Vinsel*

In addition to the power of the legislature to create, alter, or dissolve municipal corporations the legislature may, in the absence of constitutional limitations, exercise a large measure of supervisory control over the conduct of the corporation in regard to its powers, functions and duties. Under its police power the state has the right to recall and abrogate any powers previously conferred on any municipal corporation and to vest these powers in another state functionary.[1] The degree and extent of possible legislative control and supervision differs in the various states according to the constitutional limitations and the interpretations made by the courts. The general view is that neither the charter of a municipal corporation nor any legislative act, conferring governmental powers or regulating the use of property held by public corporations for governmental purposes, is a contract within the meaning of the constitutional prohibition of laws impairing the obligation of contracts.[2] The general legal doctrine is that political powers conferred upon public corporations for the local government of a place are not vested rights as against the state and that where there is no constitutional limitation the legislature is supreme.[3] The adjudged cases of different courts, as well as the writings of authorities on the subject of municipal corporations, exhibit a difference of opinion respecting the extent and scope of legislative

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1 Corpus Juris, Vol. 43, Sec. 288.

2 Dillon's *Commentaries on the Law of Municipal Corporations,* (Fifth Edition) Vol. 1, Sec. 92.

3 Martin vs. Dix, 52 Miss. 53.

authority over municipal corporations. The contentions will be presented and interpreted in the light of judicial decisions in Mississippi.

DOCTRINE OF THE RIGHT OF LOCAL SELF-GOVERNMENT

The doctrine of the inherent right to local self-government has an historical basis. Advocates of the doctrine contend that local self-government of the municipal corporation does not arise from nor exist by virtue of written constitutions nor is it a mere privilege to be conferred by some central authority. The fact is pointed out that local self-government existed before the state constitutions were created and that local self-government is a political right and not a mere privilege to be granted by some authority of the state.[4] The best presentation of the doctrine is contained in dicta written by Judge Cooley of Michigan in a much quoted case. A summary of Judge Cooley's contention is expressed in the following: "The state may mould local institutions according to its view of policy or expediency, but local government is a matter of right and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government but at its discretion sent in its own agents to administer it; or to call that system one of constitutional freedom under which it would be equally admissable to allow the people full control in local affairs or no control at all."[5]

As to governmental functions, the doctrine would not apply or if it did apply it would be limited strictly to local or municipal functions. When the municipal corporation acts in a purely private and proprietary capacity it is entitled to the same measure and character of protection as private corporations and persons.[6]

The doctrine of the inherent right to local self-government has no acceptance in Mississippi. The constitution of the state declares that the legislature may empower the governor to remove and appoint officers in municipal corporations under such regulations as may be prescribed by law.[7] Independently of this provision, the Supreme Court has expressed the opinion that citizens of a municipality

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4 McBain's *The Law and Practice of Municipal Home Rule*, pp. 12-15; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Sec. 246; Dillon's *Commentaries on the Law of Municipal Corporations*, (Fifth Edition) Vol. 1, Sec. 99.

5 People vs. Hurlbut, 24 Mich. 44, 108.

6 Corpus Juris, Vol. 43, Sec. 292.

7 Constitution of 1890, Sec. 139.

are not guaranteed the right of local self-government and that their right to participate in the choice of officers who are to administer the affairs of the local government is a matter exclusively within the judgment and discretion of the legislative department of the state government. It was held, therefore, to be within the power of the legislature to create a state revenue agent to collect escaped taxation within the city, and to authorize him to order the proper assessment of property which had escaped assessment.[8] From this decision there is little doubt but that the doctrine of inherent local self-government was never intended to apply to municipal corporations in Mississippi.

DOCTRINE OF LEGISLATIVE SUPREMACY

The general legal doctrine is that political powers conferred upon municipal corporations for local government are not vested rights as against the state. Where there is no constitutional restriction on the legislature it has absolute power to create, change, modify or destroy municipalities at will. Distinction must be drawn between governmental and private functions in respect to the scope of authority of the legislature.

In Mississippi, municipal corporations are mere creatures of the legislative will. In the absence of constitutional limitations, the power of the legislature is absolute.[9] Charters are granted or withdrawn at the will of the legislature. Even the proper and perfect performance of the duties for which it was created will not prevent the withdrawal of its charter if the legislature so desires.[10] In 1929, the Supreme Court in deciding that property within a municipality was subject to assessment for benefits by the drainage district, expressed the well established doctrine that the legislature has full control over municipal corporations, their powers and functions.[11]

CONSTITUTIONAL PROVISIONS CONCERNING MUNICIPAL CORPORATIONS

In the control of municipal corporations, the legislature is always bound by the constitution of the United States and by the constitution of the state. In its governmental capacity the municipality is bound in the same manner as the state.

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8 Adams vs. Kuykendall, 83 Miss. 571.
9 Martin vs. Dix, 52 Miss. 53.
10 State vs. Fire Company, 76 Miss. 449.
11 Gillis vs. Indian Creek Drainage District, 155 Miss. 160.

Status Under the Federal Constitution.—Although no state may pass any law impairing the obligation of contracts, a city charter is not held to be a contract and does not come under the protection of this clause.[12] Municipalities cannot avail themselves of protection under the contention that their charter is a contract. Contracts made on authority of charters are protected by the Federal Constitution. Any law which withdraws or limits the remedies for the enforcement of such contracts is void.[13]

Generally speaking, franchises granted under authorization of charters are contracts and are protected against impairment.[14] A state law limiting the powers of taxation of a municipal corporation, whereby its ability to pay its debts is materially lessened, is void as to debts created prior to the law, when creditors relied upon the taxing power of the corporation to provide the funds for the payment of their claims.[15] The United States Supreme Court holds that "where a municipal corporation is authorized to contract and to exercise the power of local taxation to meet its contractual engagements, this power must continue until the contracts are satisfied; and that it is an impairment of an obligation of a contract to destroy or lessen the means by which it can be enforced."[16] In another decision the same court held, "That obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be *obliged* to perform it, are rendered less efficacious by legislation operating directly upon those means."[17] Under the same clause, the court has held that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power that it may properly be considered as a law within the meaning of this article of the Constitution of the United States.[18]

Under the Fourteenth Amendment of the Federal Constitution, which provides that no state shall deprive any person of life, liberty or property without due process of law, the municipal corporation has received nothing like

12 Mount Pleasant vs. Beckwith, 100 U. S. 514.

13 Mobile vs. Watson, 116 U. S. 289; see also Louisiana vs. Pillsbury, 105 U. S. 284.

14 Willoughby's *The Constitutional Law of the United States,* (Second Edition) Vol. 2, Sec. 756.

15 United States vs. Port of Mobile, 12 Fed. Rep. 768; see also Seibert vs. Lewis, 122 U. S. 284; Lawyer vs. Concordia, 12 Fed. Rep. 754; Wolff vs. New Orleans, 103 U. S. 358; Ralls Co. vs. United States, 105 U. S. 733.

16 Louisiana vs. New Orleans, 215 U. S. 170.

17 Wolff vs. New Orleans, 103 U. S. 358, 367.

18 St. Paul Gaslight Co. vs. St. Paul, 181 U. S. 142.

the degree of protection which a private person or corporation might receive.[19] In a few instances, where the state legislatures have attempted to transfer the property of a city directly to a private person, the courts have held that municipal corporations enjoy the protection of due process of law.[20] However, the rights of the city have very seldom been successfully defended under the due process clause, and with few exceptions the doctrine of legislative supremacy over the political subdivisions of the state has been upheld, with little regard for the property rights of the subdivisions. The personal character of the city has often been lost sight of in favor of its political character. The general rule held by the courts is that a municipal corporation is not a person under the Fourteenth Amendment.

Status Under the State Constitution.—The functions of the municipal corporation have never been clearly differentiated from those of the state and all efforts to do so have been only partially successful. The problem becomes important when an attempt is made to protect the municipality, in maintaining control over its own activities, from legislative interference. The doctrine of legislative supremacy usually leads to legislative interference with the local self-government of municipal corporations unless the legislature is limited by the state constitution.

As legislative interference increased, its evils became more and more apparent and a desire for some remedy became prevalent. The remedy most commonly proposed has been the constitutional prohibition of special legislation. The constitutions of most states now prohibit special legislation respecting the charters of municipal corporations. The Mississippi Constitution provides that "The legislature shall pass general laws . . . . . under which cities and towns may be chartered and their charters amended."[21] Many state constitutions forbid special legislation respecting the granting of corporate powers or privileges; regulating the affairs of cities and other public corporations; creating offices or prescribing the powers and duties of municipal officers; releasing or extinguishing the indebtedness or liability of any person or corporation to a municipal corporation; authorizing the laying out, opening, altering, maintaining or vacating of highways and streets; legalizing

19 McBain's *The Law and Practice of Municipal Home Rule*, pp. 21-28.

20 Mt. Hope Cemetery vs. Boston, 158 Mass. 509; see also N. O., Mobile and Chatt. Ry. Co. vs. New Orleans, 26 La. 517; Memphis Freight Co. vs. Memphis, 4 Tenn. 419.

21 Constitution of 1890, Sec. 86.

the unauthorized or invalid acts of any officer or agent of any municipality; appointing local officers or commissions to regulate municipal affairs, providing for the bonding of cities, towns and other municipalities.[22] Some of these constitutional provisions have been made in an effort to protect local government while many others merely represent a copying from other state constitutions. Dissatisfaction over the interference of legislatures has been a major reason for these constitutional provisions. The results of the limiting clauses, however, have often failed to be beneficial. In some cases they have been too broad and sweeping to be effective, in other cases they have been artfully avoided.

In many cases, special legislation is desirable and even necessary. With certain limitations, it should quite probably be allowed. To define and distinguish between general and special laws is a difficult task and no satisfactory rule obtains. A statute is general if its terms apply to, and its provisions operate upon, all persons and subjects in a like situation. If it does not bring within its operation all persons and subject matters in substantially the same situation it is a special or a local law.[23] A "general" statute operating on all cities of over one hundred thousand population within a state is actually a special statute when there is only one such city. The prohibition of special legislation does not prohibit the classification of municipalities and the power exists unless expressly prohibited. Classification has been a common method of overcoming the constitutional prohibition of special legislation. The question of whether the legislature has exceeded its power in any given case is essentially a question of law and must be decided by the courts. The presumption is always in favor of the legislature.

The constitutional limitations on the legislature of any particular state must be determined by a study of that particular state constitution and the interpretation put upon it by the courts of that state. In comparison with other state constitutions, the Mississippi Constitution, adopted in 1890, contains few limitations upon the legislature's power over municipal corporations. The framers of that constitution were not agitated over legislative interference with municipal self-government. No doubt the absence of large cities in the state was the contributing cause. The Con-

22 Dillon's *Commentaries on the Law of Municipal Corporations,* (Fifth Edition) Vol. 1, Sec. 140.

23 Dillon's *Commentaries on the Law of Municipal Corporations,* (Fifth Edition) Vol. 1, Sec. 142.

stitution of 1869, which was in force at the time the present constitution was framed, gave the legislature a broad scope of authority. The limitations placed in the Constitution of 1890 seem, possibly, to be the result of an investigation of other state constitutions rather than the result of any great need of protection from the state legislature.

The provision of the state constitution providing that "no person shall be deprived of life, liberty or property except by due process of law" is no protection to the municipal corporation, nor is it a limitation upon the legislature's control and supervision of municipal corporations in the exercise of their governmental functions. It is worthy of notice, however, that municipal corporations, being subdivisions of the state, are directly limited by this constitution, in the same way as the state.[24] The legislature cannot avoid this limitation on its general powers by delegating the power to a municipality.[25] The provision that "ex post facto laws, or laws impairing the obligation of contracts, shall not be passed" limits the legislature to some extent, as explained under the section above in respect to the Fourteenth Amendment of the Federal Constitution. Private property may not be taken or damaged for public use unless due compensation be first paid to the owner.[26] This provision of the constitution embraces within its inhibition municipalities as well as states. For instance, when an established grade is lowered, by order of municipal authority, causing damage to an abutting property, the corporation must compensate the owner for the damage done.[27].

The municipal corporation is strictly limited in its relation to private persons.[28] This protection does not extend from the legislature to the municipality; the court holds that the legislature may divest a municipal corporation of control over its streets and authorize their use by a private corporation without compensation where the use is confined to its right of way.[29] The constitutional prohibition against taking property without just compensation restrains not

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24 Constitution of 1890, Sec. 14; see also Martin vs. Dix, 52 Miss. 53; Forbes vs. Meridian, 86 Miss. 243.

25 Quintini vs. Bay St. Louis, 64 Miss. 483.

26 Constitution of 1890, Sec. 17.

27 Vicksburg vs. Herman, 72 Miss. 211; see also Jackson vs. Williams, 92 Miss. 301.

28 Laurel vs. Rowell, 84 Miss. 435; see also Berry vs. Mendenhall, 104 Miss. 94.

29 Canton vs. Canton Warehouse Co., 84 Miss. 268.

only the power of eminent domain but also the exaction of money under the guise of taxation.[30]

In Mississippi, no person may be elected or appointed to office for life or during good behavior; all terms of office must be for some specified period.[31] This provision applies to municipal as well as other officers and the appointment of a police officer "during good behavior" has been held unconstitutional.[32] The usual provision, that no person's life or liberty shall be twice placed in jeopardy for the same offense, is no restriction on the legislature's right to confer on municipalities, by ordinance, the power to punish as an offense against the municipality an act which constitutes a crime against the state.[33]

The first direct reference to municipalities in the Mississippi Constitution is to the effect that provision may be made, by general laws, to prevent the abuse by cities, towns and other municipal corporations, of their powers of assessment, taxation, borrowing money and contracting debts.[34] On these particular subjects the constitutions of many states provide specific debt limits and other limitations which are beyond the power of even the legislature to change. The power of the Mississippi legislature is unrestricted; the determination of what is an abuse of power by the corporation being a right of the legislature.[35]

The clause prohibiting any special or local law for the benefit of individuals or corporations applies to private corporations and not to municipal corporations.[36] The constitution, on the other hand, provides for a standing legislative committee on local and private legislation and furthermore provides that "no local or private bill shall be passed by either house until it shall have been referred to this committee and shall have been reported back with a recommendation that it pass, stating reasons why the end should not be accomplished by a general law, or by a proceeding in court." If the standing committee recommends that the private or local bill do not pass, then the bill requires a majority of the entire membership of each house for passage. The courts cannot refuse to enforce it because of its local, special or private nature.[37] This

30 Macon vs. Patty, 57 Miss. 378.
31 Constitution of 1890, Sec. 20.
32 Monette vs. State, 91 Miss. 662.
33 Ocean Springs vs. Green, 77 Miss. 472.
34 Constitution of 1890, Sec. 80.
35 Turner vs. Hattiesburg, 98 Miss. 337.
36 Constitution of 1890, Sec. 87; see also Feemster vs. Tupelo, 121 Miss. 733.
37 Constitution of 1890, Sec. 89.

section of the Constitution is, however, followed by one containing specific cases where local, private or special laws may not be passed by the legislature. The cases involving municipal corporations in which general legislation would be required under this section are: (1) changing the names of persons, places or corporations, (2) exemption of property from taxation or from levy or sale, (3) laying out, opening, altering and working roads and highways, and (4) vacating any road or highway, town plat, street, alley or public grounds.[38]

The most important constitutional limitation upon the Mississippi legislature is the provision requiring the legislature to pass general laws under which cities and towns may be chartered and their charters amended.[39] This section did not repeal existing special charters previously granted.[40] Any special laws attempting to amend specific charters are unconstitutional.[41] This provision is quite similar to provisions in the constitutions of other states which attempt to provide a remedy for the evil of special charters and special laws amending the charters.

The Mississippi Constitution prohibits the legislature from ever remitting, releasing, postponing or diminishing any obligation or liability of any municipal corporation in the state. No liability or obligation of a municipality may be extinguished except by payment of the face value. This, however, is not to be so construed as to prevent the legislature from providing, by general law, for the compromise of doubtful claims.[42] Under this restriction a municipality has no power to remit or release liability to it for due and unpaid taxes, nor has it the power to refund money forfeited on account of a breach of contract for public work.[43]

The municipalities of Mississippi are not safeguarded in respect to the selection of their officers. The Constitution provides that the legislature may determine the mode of filling all vacancies in all offices, in all cases not provided for in the constitution. The legislature may provide suitable compensation for all officers and define their respective duties. Provisional emergency appointments may be made by the governor in the absence of legislative pro-

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38 Constitution of 1890, Sec. 90.

39 Constitution of 1890, Sec. 88.

40 Linn vs. Vicksburg, 72 Miss. 950; see also Corinth vs. Crittenden, 94 Miss. 41.

41 Monette vs. State, 91 Miss. 662.

42 Constitution of 1890, Sec. 100.

43 Morris Ice Co. vs. Adams, 75 Miss. 410; see also Jackson Electric Ry. Co. vs. Adams, 79 Miss. 408.

vision.[44] The word "officer" as used in the Constitution includes municipal officers.[45] The Constitution prohibits officers being interested in any contract made during the term for which the officer was chosen.[46]

The statute of limitations in civil causes does not run against a municipal corporation in Mississippi by constitutional guarantee.[47] Municipal taxation must be uniform and equal throughout the state.[48] No municipality may become a subscriber to the capital stock of a railroad or any other corporation or association or make appropriations or loan its credit in their aid.[49] It makes no difference whether the money to be subscribed belongs to it in a public capacity or in a private capacity. In case of contractor's forfeiture, where the forfeiture had never reached the hands of the treasury, the money cannot be used in violation of the provision.[50] The constitution does empower the legislature to pass general laws authorizing cities and towns to aid and encourage manufacturing, gas-works, water-works and other public utilities (other than railroads) within the limits of the municipality, by exemption from taxation for a period not longer than ten years. It would be unconstitutional to extend this aid to a concern already established.[51]

Respecting the municipal electorate, the Constitution provides that electors in municipal elections must possess the same qualifications as state electors and such additional qualifications as may be provided by law. Although an added requirement, such as residence in certain wards, is permissible under this provision, a requirement that a municipal voter should be a resident one year before registering would be a qualification contrary to the constitutional provision.[52]

Reviewing the Constitution of Mississippi, we find no clauses guaranteeing the right of local selection of city officers, no clauses prohibiting the appointment of special commissions to control municipal affairs and no clauses

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44 Constitution of 1890, Sec. 103.

45 Booze vs. Creswell, 117 Miss. 795.

46 Constitution of 1890, Sec. 109; see also Noxubee Hardware Co. vs. Macon, 90 Miss. 636.

47 Constitution of 1890, Sec. 104; see also Lexington vs. Hoskins, 96 Miss. 163; Crenshaw vs. Panola Co., 115 Miss. 891.

48 Constitution of 1890, Sec. 112; see also Adams vs. Miss. State Bank, 75 Miss. 701; Adams vs. Bank of Oxford, 78 Miss. 532.

49 Constitution of 1890, Sec. 183.

50 Adams vs. Jackson Railway Co., 78 Miss. 887.

51 Constitution of 1890, Sec. 192; Robertson vs. Southern Paper Co., 119 Miss. 113.

52 Constitution of 1890, Sec. 241, 245; State vs. Kelly, 81 Miss. 1.

prohibiting legislative interference with streets and street franchises. The clause relating to the financial powers of the city is that in which power is given the legislature to pass general laws to prevent abuse by the municipal corporations. This clause is not a prohibitive clause. The important clause limiting the legislature is the one requiring general laws for granting charters and for the amendment of these charters. With the exception of the few constitutional limitations, municipal home rule in Mississippi exists only at the will of the legislature. This legislative power is more extensive than is permitted in many of the other states.[53] It must be kept in mind, however, that the legislature does allow a great amount of local self-government by granting wide powers to the municipalities. Municipalities in Mississippi owe their local self-government to the discretion of the legislature and not to any doctrine of an inherent right to such, or even to guarantees contained in the Constitution.

CONTROL AND SUPERVISION BY THE STATE LEGISLATURE

In considering the extent of legislative power over municipal corporations it must be remembered that this power is subject to constitutional limitations. Municipal corporations are created for governmental purposes and their rights rest largely on legislation. Municipal powers of a private nature are governed by the principles of private law.

Charters.—A charter is necessary to the creation and existence of a municipal corporation. The charter grants the people of the municipality a degree of local government, determines the form of government and defines the rights, powers and obligations of the corporate body. Only through the charter does the municipal corporation exist and function. Charters are now granted in Mississippi by general laws.

It is one of the fundamental principles of constitutional government that the legislature of a state cannot delegate the power to make laws which has been intrusted to it by the people. To allow the management of local affairs by local authorities is not regarded as a transfer of general legislative power but rather a grant of authority to prescribe local regulations. This power of local management

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53 McBain's *The Law and Practice of Municipal Home Rule,* pp. 29-106; McQuillin's *Treatise on the Lew of Municipal Corporations,* Vol. 1, Secs. 185-196; Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Chaps. 4, 5, 6.

is subject, of course, to the interposition of the superior in cases of necessity.[54] It is generally held that legislatures may pass laws to take effect in a municipality when accepted by some authoritative body representing the municipality or by a vote of the people affected.[55] The assent of the municipality incorporated is not necessary in the absence of constitutional prohibitions although the legislature usually provides for local assent.[56] A charter must be narrowly interpreted and should not receive a latitudinarian construction; if there is doubt as to a legislative grant the doubt must be resolved against the power. The charter should be so construed as to carry out the legislative intent.[57]

The Constitution of Mississippi now prohibits the granting of special charters but some municipalities chartered under this method previous to the constitutional limitation still operate under special charters. The year 1884 probably was the high point in special acts granting municipal charters in Mississippi. In that year the legislature passed ninety-seven special acts granting special charters and amending charters already granted, these acts covering three hundred and seventy-four pages.[58] The Constitution of 1890, requiring general laws for the creation and governing of municipalities, did not repeal existing special charters. Special charter cities may have powers which are denied to municipalities operating under the general laws.[59]

The fact that a city operates under a special charter does not, of course, give it a better legal status in relation to the state than if it operated under the general laws. No powers other than those granted by the legislature, either expressly or by necessary implication, can be used by special charter cities.[60] Special charter cities are subject to the same legislative supremacy. In an outstanding case the court held that the Constitution of 1890, which authorizes the legislature to pass general laws under which cities may be chartered and which provides that all such laws be subject to repeal or amendment, does not deprive the legislature of the power to control the taxing power

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54 Stoutenburgh vs. Hennick, 129 U. S. 141; New Orleans Waterworks Co. vs. New Orleans, 164 U. S. 471.

55 Territory vs. O'Connor, 5 Dak. 397; State vs. Copeland, 66 Minn. 315; State vs. Summers, 33 S. Dak, 40.

56 Carrithers vs. Shelbyville, 126 Ky. 769; People vs. Butte, 4 Mont. 174.

57 Greenville vs. Laurent, 75 Miss. 456.

58 Laws of 1884, pp. 396-770.

59 Corinth vs. Crittenden, 94 Miss. 41.

60 Wise vs. Yazoo City, 96 Miss. 507; Love vs. Yazoo City, 91 Miss. 535.

previously delegated to a municipal corporation by a special charter.[61]

Originally, only the special charter existed, but after the limitation on this method of granting charters the only method by which a municipal corporation could incorporate was by acceptance of the code charter. In the Code of 1892, adopted just after the constitutional limitation on special legislature, a provision was made to the effect that every municipality in the state should come under the code charter unless otherwise indicated by a resolution of its corporate authorities, recorded and certified to by the secretary of state. This had to be done within twelve months after the code chapter became operative.[62] It was also possible for an election to be called on the initiative of one-fourth the qualified electors in case the authorities did not act. The corporate authorities of Jackson resolved to accept the code charter and passed ordinances under the new charter; later, however, they decided not to accept the code charter and passed a resolution to that effect, sending it to the secretary of state for recording. In a case involving this question the city was held to have accepted the code chapter and once accepting, no denial could take place.[63] The majority of the municipalities accepted the general law at the time of its passage.

To cities yet operating under special charters, procedure is available whereby they may come under the general law. One-fourth of the electors may petition the authorities for an election to determine the desire to come under the code chapter. If a majority of the legal votes cast are in favor of adopting the code charter, it is only necessary to certify this result to the secretary of state. If the majority is opposed to the change, the municipal authorities record the fact and another election, submitting this question, may not be held for two years. Until the acceptance of the code charter, the corporate powers and rights of special charter cities remain as the law provides in the charter.[64]

Any city, that is, a municipality having two thousand or more inhabitants, in Mississippi, has the option of accepting the commission form of government.[65] A petition signed by at least ten percent of the qualified electors of the city is required to initiate an election to determine the desire of the electors as to whether the existing form of

61 Yazoo City vs. Lightcap, 82 Miss. 148.
62 Code of 1892, Sec. 3035.
63 Jackson vs. Sholmberg, 70 Miss. 47.
64 Code of 1930, Sec. 2624.
65 Code of 1930, Sec. 2626.

government or a commission form is desired.[66] After six years of operation, a commission city may elect to abandon its charter and return to its previous charter, whether this be a code charter or special charter.[67]

The powers conferred upon the municipalities under any one of these charters may, at any time, be altered or repealed by the legislature, by a general law operating on the state as a whole.[68] A municipality which has not come under the code chapter may amend its charter. The amendment must first be prepared in writing and published, then submitted to the governor who in turn submits it to the attorney-general. If the attorney-general is of the opinion that the amendment is not contrary to the constitution and laws of the United States or to the Constitution of the state, even though inconsistent with the code chapter on municipalities, the governor will approve the amendment. In case of one-tenth of the electors protesting an amendment it must be submitted to the electorate. After having been recorded with the secretary of state and upon the records of the municipality the amendment is in effect.[69] This method of allowing amendments to special charters is not held to be a violation of the constitutional provision requiring general laws for the amendment of charters.[70]

Commission cities may bring about an increase in the powers of their council by a similar method. An ordinance changing the powers of the council must be passed by a two-thirds vote of the electorate. In this case the attorney-general must be of the opinion that the new ordinance is not inconsistent with the provisions of the commission act statutes as well as the federal laws and constitution and the state constitution.[71]

Corporate Property.—Because of the public character of the property and functions of a municipality, it is generally assumed that the state, through its legislature as the guardian of the public interest, may, when necessary, take full control of the public property and the public rights of municipal corporations. As parts of the government of the state, municipalities may not own public property free

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66 Code of 1930, Sec. 2627, 2628.

67 Code of 1930, Sec. 2655.

68 McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Sec. 357; Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 233.

69 Code of 1930, Sec. 2625; McClure vs. Natchez, 139 Miss. 187; Sick vs. Bay St. Louis, 113 Miss. 175; Williams vs. Vicksburg, 116 Miss. 79.

70 Yazoo City vs. Lightcap, 82 Miss. 148; Adams vs. Kuykendall, 83 Miss. 571.

71 Code of 1930, Sec. 2646.

from state control and regulation. A majority of judicial decisions do, however, distinguish between property held by the municipality as public property and that held as municipal or private property. Governmental or public property is that held in trust for the use and benefit of the general public.[72] Absolute legislative control over property held by the municipality for other than governmental or public purposes is generally denied by the court on the ground that such property is private and entitled to protection as such. Even though the municipalities have the right to sell and lease property, the legislature may prescribe the mode of disposition.

As an incident to their corporate powers, municipal corporations may purchase and hold property, both personal and real, and may receive real property as a gift for any corporate purpose. While they may purchase property with the public funds only for public use, once the property is acquired in good faith the municipal corporation may hold it even though the property is not devoted or intended to be used for public purposes.[73]

Streets.—The use of streets is designed for the public at large; a municipal corporation, though holding the fee in its streets, has no private, proprietary right or interest in them. The management of its streets is a municipal duty. The legislature may authorize the laying of pipes, wires, rails and other structures by a public service corporation in the streets of a municipality without the consent of the municipal authorities and without any provision for condemning or otherwise acquiring the right of way.[74] In the absence of constitutional restrictions, the legislative control over streets is supreme. In a recent decision regarding this subject the general rule is well illustrated. The village of Ridgeland objected to the location of a new road in Madison county, insisting that the county had no right to build a highway through the municipality without the consent of the village authorities, or, if mistaken in this, that the route must follow one of the established streets of the village. The village threatened to enforce an ordiance making it a misdemeanor to work on the proposed new route within the limits of the municipality. The opinion of the court supports the general rule: "In the days of the wagon

72 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 115; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 219-226.

73 Ruling Case Law, Vol. 19, Secs. 76-78; Mahon vs. Columbus, 58 Miss. 310.

74 Meridian vs. Western Union, 72 Miss. 910; Canton vs. Canton Warehouse Co., 84 Miss. 268.

and the one-horse shay, it was the law that the jurisdiction of the county, in respect to roads and streets, ended at the line of the municipality and that within the incorporated territory the authority of the municipality was exclusive." This statement was based on a case decided in 1895.[75] At the regular legislative session of 1928, the legislature laid aside all these municipal reservations in so far as concerns the trunk line roads.[76] The court continued: "In this state the power of the legislature over municipal streets is plenary, unless in exceptional cases not here presented. It has the power to divest the municipality of all control over its streets and authorize their use by corporations without compensation to the municipality. It is a question of legislative will, not a question of power."[77] Municipal interest in streets is totally unlike property of the private corporation.

Public Utilities.—The term, "public utility," implies a public use, carrying with it the duty to serve the public and treat all persons alike. The regulation of public utilities, in so far as municipal corporations are concerned, must be treated under two heads: (1) where the public utility is privately owned, and (2) where the public utility is municipally owned.

Many states provide for uniform regulation of public utilities by a general board or commission, with its powers and duties designated by statutes. In this case the municipality is usually excluded from any sort of regulation. In case the municipality is not excluded by law, it may exercise a concurrent power of regulation, being careful not to exceed its powers or to conflict with the law. These general rules are usually applied to such public utilities as gas companies, electric companies, railroads, street railways, water companies, telephone and telegraph companies. In the amount of regulation which a municipal corporation might be able to exercise, it would be acting in a governmental capacity, and in the absence of constitutional restrictions, under whatever law the legislature might think advisable to enact. The general regulation of public utilities is inherent in the police power of the state and does not exist in the municipal corporation unless such power has been delegated to it by the legislature.[78]

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75 Blocker vs. State, 72 Miss. 720.

76 Laws of 1928, Chap. 82.

77 Ridgeland vs. Madison Co., 154 Miss. 613; Canton vs. Canton Warehouse Co., 84 Miss. 268.

78 McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 249-254; Corpus Juris, Vol. 43, Secs. 553, 554.

Where the municipality constructs or purchases public utilities, it acts in its private and corporate capacity rather than in its governmental capacity. This statement should be limited, however, to the principles upon which the rights of the municipality as a contracting party or the liability for negligence are to be determined. In the management and operation of these utilities municipalities cannot be exempt from legislative control. Under most aspects, subjects of this character are regarded as property belonging to the private affairs of a corporation, but under others might be regarded as a public matter. It is practically impossible to draw any definite rule as to a division of these aspects and courts differ in their decisions in the light of different facts.[79]. Even if owned by the municipality, there is no inherent power of supervision or regulation where the legislature wills otherwise.

Funds and Revenues.—The authority of the legislature extends to making provisions concerning the funds and revenues of municipal corporations, regardless of the fact that the purpose for which the revenue is to be appropriated is specified in the charter. The rule is that municipal corporations have no vested rights in powers conferred on them for civil, political or administrative purposes. The Supreme Court, in an early decision, did not hold to the general rule. By its charter a municipality in Mississippi was granted sole power to grant licenses to sell spiritous liquors within its limits and to appropriate the resulting revenue to city purposes. Subsequently the legislature passed an act directing that this revenue should be paid by the city to an academy located within the city. The municipal authorities refused and when the academy sued the court held that by its charter the town had a vested interest in the profits arising from licenses. The court admitted that the legislature might take away the power to grant licenses, but it denied the right of the legislature to make a disposition different than the charter designated without the consent of the municipal corporation.[80] Such a decision could not be maintained and in a subsequent case, in regard to the same fund, the court reversed its former decision and held the municipality to have no vested interest in the fund.[81] The power of a municipality in regard to taxation funds and revenue is the result of the state giving the municipality a portion of its power and it is

79 Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 116.

80 Aberdeen Academy vs. Aberdeen, 21 Miss. 645.

81 Board of Education vs. Aberdeen, 56 Miss. 518.

always subject to recall, control or modification by the legislative authority, in the absence of constitutional limitations.[82]

Another question arises upon consideration of the possible legislative control of funds arising from other than a legislative grant, such as profits on gas-works, waterworks, lighting plants and the like. The courts protect unwarranted interference with similar funds of other corporations and there is no good reason why such funds of municipal corporations should not be protected from legislative control.

Municipal Duties and Obligations.—It is usually held by the courts that legislatures may impose pecuniary obligations and liabilities upon a municipal corporation without the latter's consent. This extends to the discharge of obligations not cognizable either at law or equity.[83] It is generally held that the legislature may compel the municipality to establish and maintain highways, bridges, docks, levees, and wharves. To support these the legislature may compel the issuance of bonds for whole or part payment, compel the levy of taxes and the payment of all legitimate claims. There are numerous cases supporting the right of the legislature to impose such obligations upon municipalities.[84]

In respect to contracts, the municipality often finds itself in an unfortunate situation. A contract to which a municipal corporation is a party, relating to a public or governmental matter, may be revoked by the legislature with the consent of the other party without violating the right of the municipality. Powers, general or special, granted by the state to a municipality, as the right to maintain a ferry and charge toll, are not regarded as resting on a contract and may, therefore, be impaired or destroyed at the will of the legislature. As before mentioned, neither the legislature nor the municipality can impair the obligation of a valid contract as against third parties.[85]

Where municipal improvements concern the public at large and are not merely of local concern, it is well settled that they are subject to the absolute control of the legislature except in so far as the constitution may prohibit and

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82 Corpus Juris, Vol. 43, Secs. 305-306; Ruling Case Law, Vol. 19, Sec. 73; Dillon's *Commentaries on the Law of Municipal Corporations* (Fifth Edition), Vol. 1, Sec. 105; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 255-257.

83 Vasser vs. George, 47 Miss. 713.

84 Corpus Juris, Vol. 43, Sec. 301; McQuillin's *Treatise on the Law of Municipal Corporations*, Vol. 1, Secs. 255-257.

85 Ruling Case Law, Vol. 19, Sec. 74.

restrict. In Mississippi, the legislature has been held to have the authority to confer on municipalities the power to own and operate an electric railway and to issue the necessary bonds, although the railway was held to be a business inconsistent with the customary functions of a municipality.[86] The control of the legislature over public improvements of a strictly local nature is not so absolute. Some decisions hold the legislature to have control while others have upheld the right of local self-government to the extent of denying the power of the legislature to control local improvements of this nature.[87]

In regard to the legislative control of the liabilities of municipal corporations, no better statement of the rule could probably be made than was given in a New York case as follows: "Municipal liability for injuries is a matter that is within the control of the legislature and when it is enacted what the liability shall be, and the conditions upon which it may be enforced are prescribed, the statutory provisions are controlling upon the subject."[88]

In the preceding discussion no attempt has been made to fully cover the subject of legislative control of municipalities. Every power, every function and every act of the municipal corporation must be considered in the light of legislative control. As powers and functions are discussed in later chapters the control and supervision of the legislature of Mississippi in regard to municipal corporations is given further explanation.

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86 Love vs. Yazoo City, 91 Miss. 535.
87 Corpus Juris, Vol. 43, Secs. 302, 303.
88 Winter vs. Niagara Falls, 190 N. Y. 198.

THE COUNTY COURTS IN MISSISSIPPI

By P. S. Sikes*

The term "county court" has not yet acquired a definite meaning in the United States. Respectable authorities use the term to designate a court of general unlimited jurisdiction in which the county is taken as a convenient unit of administration, but in which the presiding judge, especially in rural sections, holds court in each of a group of counties.[1] However, this use of the term seems unwarranted and misleading in view of the fact that while such a court is found in more than forty of the forty-eight states, not in a single state is it generally known as a county court.[2] On the contrary, such a court is ordinarily called a circuit, district, or superior court.[3] Even in those states having a court of general unlimited jurisdiction with one or more judges in each county it is called a superior or common pleas court.[4] Furthermore, a large majority of the states at present have, either generally or in particular counties, courts of special or limited jurisdictions confined to single counties and presided over by one or more "non-circuit riding" county judges. In many of these states such courts have probate jurisdiction primarily, or exclusively, and are generally known as probate or orphans courts.[5] In other states the courts are called county courts, but with functions primarily, or largely, administrative or legislative in character.[6] However, in a growing number of states, twenty-one at present, there are courts with a limited civil and criminal (and often probate) jurisdiction and such courts are most commonly known as county courts.[7]

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1 F. A. Ogg and P. O. Ray, Introduction to American Government, (fourth ed. complete, 1930), p. 820.

2 C. N. Callender, American Courts, Appendix, pp. 237-76.

3 J. M. Mathews, American State Government (1926), p. 434 ff; and Callender, op. cit.; See also, Hill vs. State, 109 Pacific 291 (an Oklahoma case) and Webb vs. Texas Christian University, 107 S. W. 86 (a Texas case). In both of these cases it was clearly stated by the respective appellate courts that the term "county court" did not refer to the court of general unlimited jurisdiction found in each county of the respective states.

4 Callender, op. cit.

5 Idem.

6 Constitution of Arkansas (1874), Art. VII, Secs. 28-37. Carroll's Kentucky Statutes (1930), Ch. 35, Part 7; Oregon Laws (1920), Ch. IV, p. 885; Annotated Code of Tennessee, Title VII, p. 5660.

7 Callender, op. cit.

The group of courts last mentioned seems most nearly to conform to the type the special committee of the American Bar Association apparently envisaged when it suggested a county court as one of the three branches of its proposed unified court system in 1909.[8] This general type was also set out by Dr. Herbert Harley in a plan for a "model county court" as far back as 1914.[9] More recently such a court has been recommended in the New York Crime Survey completed in 1927.[10] It is true that scarcely any existing county courts measure up fully to either of these suggested plans, but it is significant that the plans are in accord in their use of the term "county court."

In view of the above discussion one may hazard certain conclusions. In the first place, there is a perceptible tendency to use the term county court to designate a court with a limited civil and criminal jurisdiction, confined to a single county, and with one or more "non circuit riding" judges. Secondly, on the basis of state populations at least, more people in the United States use the term county court to connote a court of this type than any other one general type of court.

The county courts that have been established in Mississippi and that are to be studied here are courts of this single-county, single-judge, limited-jurisdiction type. And, although the courts exist in scarcely more than one-sixth of the counties of the state, there seems to be ample justification for a rather detailed study of the system. Courts of this nature are likely to become of increasing importance in the administration of justice in the states generally.[11] In Mississippi there is strong evidence that they will be more widely established and that their jurisdiction will be extended.[12] The few courts in the state have already demonstrated that they will relieve the congestion of circuit and Supreme Court dockets.[13] Furthermore, the county courts are authoritatively recognized as an important part of the judicial machinery of Mississippi.[14]

Section 172 of the Constitution of Mississippi empowers the legislature to "establish such inferior courts as may be necessary, and abolish the same when deemed expedient."

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8 American Bar Association Reports, XXXIV, p. 588, (1909).

9 3 California Law Review 1-13 (1914).

10 New York Crime Survey, p. 44 (1927).

11 See notes 7, 8 and 9 above; also, Chester H. Smith, "The Passing of the Justices of the Peace," 15 Cal. Law Review, 118-41 (1927).

12 Compare provisions of the County Court Act of 1926 with the county court provisions in the Code of 1930. See discussion below.

13 See data and discussions below, pp. 172, 173.

14 Hill vs. State, 157 Miss. 149 (1930).

Under the authority of this constitutional grant the legislature passed the County Court Act in 1926. Under this act (and as carried forward in the Code of 1930) a county court is established in each county having a population exceeding 35,000 or an assessed valuation of real and personal property exceeding $17,000,000, and in either case a city with a population of 5,000 or above. The federal census of 1920 was originally taken as the basis for determining the populations. If a county becomes eligible under either two of the alternative requirements during any four year period calculated from 1926 a court is established therein by proclamation of the Governor. On the question of attainment of eligibility by a county the Governor is the sole judge. He is not limited as to sources of evidence on which to base his decision. The court is not actually established, however, until the first Monday in January following his proclamation which is required to be made on or before the first day of May.[15] It is further provided that any other county may establish a county court by popular vote. Also, that if any county in which the court exists by reason of the mandatory requirements falls below these requirements, the court is automatically abolished in that county unless the county votes to retain it.[16]

In ten counties of the state courts were mandatory when the law was passed, and one came under the mandatory requirements in 1930. Five counties have voted on the question of the establishment of county courts. In three of these the votes were for establishment. Thus county courts now exist in fourteen of the eighty-two counties of the state.[17]

The judge of a county court is elected by popular vote in the county for a term of four years. He is required to possess the same qualifications as are required of the circuit and chancery court judges—namely, to be at least twenty-six years of age, to have been a resident of the state five years, and a practicing lawyer five years.[18] In the counties in which the court is mandatory the judge receives a salary of $3,600 a year. In other counties the salaries range from $1,800 to $3,000 a year depending on the assessed valuation of the real and personal property within the particular

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15 Hill vs. State, op. cit.

16 Laws of Mississippi, 1926, Ch. 131; Mississippi Code of 1930, Ch. 17.

17 Biennial Report of the Secretary of State (Miss.), 1926-27, pp. 156-57; Hill vs. State, op. cit.

18 Constitution of Mississippi (1890), Sec. 154; Mississippi Code of 1930, Ch. 17, Sec. 697.

county. He is not permitted to practice law in any of the courts of his county during his continuance in office.[19]

An examination of the list of county judges now serving indicates that this bench is held in high esteem. Most of the incumbents have long been prominent members of the bar of the state and some have held responsible official positions. The name of one ex-governor appears on the list.

The county courts have jurisdiction over a great variety of matters and causes. This jurisdiction may be original or appellate; exclusive or concurrent. All cases over which the justices of the peace have jurisdiction may be tried in the first instance in the county courts. Likewise a case in law or equity, triable in a circuit or chancery court, may be brought in a county court if the principal amount involved does not exceed $1,000. Any case tried in a justice of the peace or municipal court may be appealed to the county court for a trial *de novo*. In eminent domain, partition of personal property, and unlawful entry and detainer—matters formerly coming to the justice of the peace courts—the county courts exercise exclusive jurisdiction. Cases may also come into the county courts by transfer. Any criminal case, other than capital, may be transferred to the county court after an indictment in the circuit court.[20]

County judges have certain powers with reference to the use of remedial writs. They may issue writs of habeas corpus when applications are made therefor, and may try matters of habeas corpus when made returnable before them by themselves or by superior judges. They may also issue such remedial writs as certiorari, attachment, supersedeas, etc., as are necessary to the proper disposition of cases pending before their courts. However, county judges do not have the original power to issue writs of injunction and, except as above stated, other remedial writs in equity or in law. But if a circuit or chancery judge directs the hearing of an application for one of these reserved writs before a county judge the latter may issue or refuse to issue it. The Supreme Court has held that the county judge in such hearing is confined to the sole question of whether the writ shall issue and he can make no other disposition of the matter.[21]

The judge of each county court is required to hold monthly terms of court at the county court house or at

19 Mississippi Code of 1930, Ch. 17, Sec. 693.

20 Ibid., Sec. 705.

21 Mississippi Code of 1930, Ch. 17, Sec. 698; see also, Welch vs. Bryant, 157 Miss. 559 (1930).

some other designated place. These terms must begin on the second Monday and may continue as long as the business before the court requires. Upon proper notice a judge may convene special terms. In counties having two judicial districts the court is held alternately in each district.[22]

The county courts are courts of record. The clerks of the circuit courts are required to serve also as clerks of the county courts. The sheriffs are the "servants of these courts" and must attend all of their sessions in person or by deputy and perform functions corresponding to those required of sheriffs in the circuit courts. Likewise the county attorneys are the prosecuting officers in the county courts. County judges are each authorized to appoint a reporter for his court. For each term, if a jury case is docketed, from twenty to forty jurors must be drawn and summoned in the same manner as jurors are drawn and summoned for the circuit courts. The county courts employ no grand juries.[23]

As to the rules of practice and procedure in the county courts the Supreme Court has said:

> "Chapter 131 of the laws of 1926, Section 2, creating the county court and prescribing the practice and procedure therein, in effect, provides that the rules on pleading, practice and procedure in said court shall be the same as those which are in force in the several other courts in cases of which the county court has jurisdiction. The same procedure existing in a justice of the peace court in that character of case should be the rule of practice in the county court; the same practice as to the chancery court case as was then existing in the chancery court should be the practice in the county court, and likewise for the circuit court."[24]

There are, however, certain specific changes in the rules of practice and procedure applying only to the county courts which are of sufficient number and importance to warrant some comment. Since much of the criticism of courts in general is directed at antiquated rules of procedure, anything tending toward an improvement in procedure will be watched with interest and hope.

Those same rules as to number, challenges, verdicts, *et cetera,* with reference to the jury in the circuit courts must be observed in the county courts. Yet, one important change in connection with the jury in these latter courts has been made. This change will probably reduce the number of

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22 Ibid., Sec. 702.
23 Mississippi Code of 1930, Ch. 17, Secs. 699, 700, 701 and 703.
24 Spier vs. Moseley, 158 Miss. 63 (1931).

jury trials and cut down court expenses. The parties in a suit must demand a jury before a definitely stated time before the case is called or else forfeit their right to a jury trial. This demand must be made in civil cases by the plaintiff when he files his declaration, and by the defendant when he files his plea. In criminal cases the demand must be made by the defendant when he is arraigned. In any case, however, the judge may allow a jury for any cause happening after these events. Another important change is that the jury cases upon the docket must be tried first and the jury discharged. But the judge is permitted for cause to discharge the jury to some future date, dispose of the non-jury cases, and then to re-assemble the jury. There is further a change in regard to instructions to the jury which appears salutary. Instructions given to the juries in circuit courts must be in writing. But in the county courts, upon consent of the parties, the judges may give oral instructions. He may not, however, comment on the weight of the evidence.[25]

Innovations which appear both interesting and radical have been made in connection with appeals. All appeals from the county courts must be made to the circuit courts—and this, though the case which is appealed may be from the chancery side of a county court and could not be brought in first instance in a circuit court, except of course, by mistake of jurisdiction.[26] This arrangement was practically unavoidable if appeals were to be allowed at all in such cases, since the Constitution confers no appellate jurisdiction on the chancery courts. Appeals might, of course, have been allowed to go directly to the Supreme Court. Hence, in fourteen counties of the state circuit courts have become, at least in part, courts of chancery; and thus there is little logic left in the judicial system of Mississippi. Separate courts of chancery may or may not be justifiable. Whatever may be the merits and defects of our present organization it has not the virtue of consistency. Indeed it may be that the growth of courts is determined—"as is the life of the law—by experience, and not by logic."

When a case is appealed from a county court to the circuit court it is tried "on the record only." If it is affirmed it is sent back to the county court for the execution of the judgment. If reversed it is transferred to the issue docket of the circuit court and tried *de novo*.[27] Appeals to the Supreme Court are ordinarily allowed from decisions

25 Mississippi Code of 1930, Ch. 17, Sec. 703.
26 Ibid., Sec. 704; Constitution of Mississippi (1890), Secs. 147 and 157.
27 Mississippi Code of 1930, Ch. 17, Sec. 704.

of the circuit courts.[27a] But if a case originates in a municipal or justice of the peace court and is appealed to a county court then to a circuit court, no further appeal is allowed unless a constitutional question is involved. Even in the latter type of cases an appeal is allowed only if granted by the circuit or a Supreme Court judge.[28]

To many reasonable men this limitation on appeals might reasonably seem a most unjust and arbitrary discrimination. To many learned lawyers—learned, though not fully acquainted with supreme court decisions,—this might seem to have all the earmarks of a "denial of the equal protection of the law." He who lives in a county which has a county court may be denied the right to appeal a case to the Supreme Court, whereas his neighbor across the county line may appeal an exactly similar case to that court. Yet any attack upon this provision must be upon moral and not upon legal grounds. In view of the decision of the United States Supreme Court in the case of *Missouri vs. Lewis*,[29] and in view of the fact that Mississippi's Constitution has no "equal protection of the law" clause in it, there is little liklihood that this provision will be successfully attacked on constitutional grounds. In actual practice not very many cases will be kept out of the Supreme Court by this provision. Of seventy-two cases going from the county courts from 1927 through the spring term of 1931 only fourteen would have been affected by this provision.[30] It must be remembered that the justice of the peace and municipal courts have very limited jurisdiction. Nevertheless, there are objections to closing the doors of the Supreme Court to litigants simply because their cases are minor ones, or because the litigants have had their "two days" in trial courts and their "day in an appellate court." These objections seem all the more plausible when it is borne in mind that the appellate court here referred to is primarily a trial court and is not accustomed to hearing cases "on the record." The single judge is locally elected for a short term. Such a court compares very unfavorably with the Supreme Court—a collegiate court, with long-term judges and "sitting at a distance." Who knows but that two hundred dollars to a poor litigant may mean more than two thousand to a rich one?

27a Except that in all cases from the justice of the peace courts involving less than $50 the circuit courts have final jurisdiction. Ibid., Ch. 3, Sec. 67.

28 Ibid., Sec. 705.

29 101 U. S. 22.

30 Mississippi Supreme Court Reports, Vols. 148-159. It should be noted that this provision was not in the original county court act, but was adopted in the Code of 1930.

To say the least, there is danger in granting to circuit courts in Mississippi an absolute power of final disposition. This danger is well indicated by a decision handed down by the state Supreme Court. That this decision deals with a case that came up from a circuit court that is now, and was then, the "highest court of the state" for certain cases makes it all the more impressive. The court said:

"We do not address ourselves to any error of the court in putting the case to trial, and do not decide that there was or was not any error in this respect. But we do say, with an obviously weak case, it is enough to arouse our strict attention, to say no more, to the very obtrusive fact that as soon as appellant had gone, and his witnesses had separated, and his attorney was beyond reach, the case was put on trial when the attorney had been there seven and one-half days when no trial during that time could be had. The testimony of the prosecuting witness, and of those who testified to the various movements and conversations of that witness, bear the earmarks of what is commonly called a 'frame-up' on the part of that witness."[31] (Of course, the case was reversed.)

This quotation needs little explanatory comment. It is enough to make a reasonable man somewhat dubious as to the desirability of making circuit courts final courts of appeal in a large number of civil and criminal cases.

This does not overlook the important consideration that it is highly desirable to relieve the congestion of the Supreme Court docket by restricting the number of appeals from lower courts. But it is strongly urged that such congestion should not be relieved by any method which sacrifices the fair administration of legal rules and certainly not by any method which involves—as this seems to involve—a certain amount of discrimination against those "unfortunate" individuals who chance to live in counties having county courts. If the right of appeal must be restricted, that restriction should in simple fairness apply to all citizens of the state. This argument gains force when it is considered that there is a tried and proved method by which this discrimination can be avoided and which will at the same time reduce litigation before the Supreme Court.

The method to which reference is made is that invoked by use of the writ of *certiorari*. Several states have used this writ for such purposes with good results.[32] Its use

31 Brown vs. State, 153 Miss. 737 (1929).

32 Edson R. Sunderland, "The Problem of Appellate Review," 5 Texas Law Review 126 (1927); Walter F. Dodd, "The Work of the Supreme Court of Illinois," 21 Illinois Law Review 207 (1926).

for some purposes is by no means in the jurisprudence of Mississippi. It may be used there in connection with the bringing of records of certain administrative bodies before the circuit courts for review.[33] Also in certain cases in justice of the peace and municipal courts, where the time for appeal has expired, the circuit courts may use the writ of *certiorari to* get the cases before them.[34] In our federal system of courts the use of *certiorari* is extensive. With few comparatively unimportant exceptions, all appeals to the United States Supreme Court (from federal tribunals) is by *certiorari.*[35] All final judgments of state supreme (or highest) courts are reviewable by *certiorari* although certain of them are reviewable by direct appeal.[36] The certiorari has certainly demonstrated its value in the federal system. A congested docket is no longer a problem of the Supreme Court of the United States. Recent press reports inform us that the court recessed soon after its fall (1931) term began, because there were no cases ready for hearing.[37] In other words, the court "caught up" with its docket,

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33 Mississippi Code of 1930, Ch. 3, Sec. 73; see also Power vs. Robertson, 130 Miss. 188 (1922).

34 Ibid., Ch. 3, Sec. 72;

"The writ of certiorari is for two purposes; first, as an appellate proceeding for the re-examination of some action of an inferior tribunal; second, as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication." 11 Corpus Juris, p. 89, Sec. 3. (Quoted by the Miss. Supreme Court in the case of Shapleigh Hardware Co. Inc. vs. Brumfield, et. al., 130 So. 98 (1930)). Ch. 19, Sec. 742 of the Code of 1930 authorizes the Supreme Court to use the certiorari but the purpose here is evidently as indicated in the latter purpose above and is not meant to be used as an ordinary method of getting cases before this tribunal. The court said in the Shapleigh case: "It is for the first of these purposes that the writ is here sought; in other words the purpose here is to substitute a writ of certiorari for an ordinary appeal. The Constitution does not provide the method for reviewing cases from a trial court to the Supreme Court, leaving the procedure therefor to be regulated wholly by the Legislature from which it follows that a case can be removed from a trial court to the Supreme Court for review only in the manner provided by statute.

"Section 32, Code 1906, Hemingway's Code 1927, Sec. 7, provides that 'all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court by appeal' . . . . this method excludes all others."

In Illinois, under the Certiorari Act of 1909, civil cases involving more than $1,000 may go from the intermediate courts of appeals to the Supreme Court only upon a writ of certiorari from the latter court. Cases up to $1,000 may go only upon a "certificate of importance" granted by the intermediate court.

35 U. S. Compiled Statutes, Sec. 1217 (1927); U. S. Statutes-at-Large, (1927-29) XLV, Part 1, pp. 54 and 466. In all cases of appeal, the appellant is required to file a preliminary statement showing that the case is properly before the court. In effect, this makes cases on appeal subject to the same preliminary review as cases on *certiorari.* See Rule 12, 275 U. S. (Appendix) 603-04.

36 Ibid., Sec. 1214.

37 U. S. Daily, Nov. 3, 1931, p. 6.

at least in the technical sense of the term.[37a] Even at that, no case disposed of by the Supreme Court of Mississippi is so small or insignificant that the United States Supreme Court might not order it sent up to that tribunal if it thinks a person has been deprived of a right guaranteed to him by the constitution, laws or treaties of the United States. Does the Mississippi Supreme Court stand in the same relation to a person in Mississippi when his rights under the statutory laws of the state are in jeopardy? Quite obviously under the present system it does not. But it should. Even the use of a writ of error, especially if the issue of the writ were allowed only to members of the Supreme Court, seems preferable to "shutting the door and throwing the key away."

Thus far this inquiry has been directed primarily toward the legal aspects of the county courts. No clear idea of the work and importance of these courts—nor for that matter of any other governmental agencies—can be secured simply by studying the naked legal provisions pertaining to them. Just as an examination of the constitutional and statutory provisions of this country yields no information as to the amount of liquor consumed in this great land of ours, so no mere perusal of code and statute can reveal that good work which county courts are rendering in those counties in which they exist. The proper study of any problem in administration involves, to borrow a phrase from the legal fraternity, questions of fact as well as of law. Hence a critical examination of the actual operation of these courts is an indispensible prerequisite to an adequate evaluation of their worth. To obtain reliable results the investigator would have to examine a large number of particular cases and the effect that the county courts had upon the settlement or trial of these cases, and further, the effect that such dispositions had upon the burden of other courts operating within the same territorial jurisdiction. Such an undertaking would be altogether too extensive, and too expensive, for the average "unendowed" individual to attempt. This particular investigator was not endowed. Hence only the more readily obtainable material will be used. The fragmentary character of the data offered below will be quite obvious. Opinions drawn from them are admittedly not conclusive. They are offered for no more than they are worth.

To illustrate the nature and importance of the work of these courts statistics taken from a few typical counties

37a There were cases on the docket, but none ready for argument.

during average terms of court might be examined. The following table contains data from the records of three courts for one month each:

TABLE I

	Leflore	Jones	Lee
Number of cases on dockets	134	99	108
Civil	111	81	70
Criminal	23	18	38
Cases over which the circuit had concurrent jurisdiction	72	37	70
Cases tried	45	44	40
with jury	15	15	20
without jury	30	29	20
Cases *nolle prosequi*	1	2	3
Cases settled, withdrawn, etc.		16	22
Cases continued	89	36*	35
Cases appealed to circuit court	2	7	3
Days of court held	10	8	4
Approximate cost (exclusive of judge's salaries)	$340.50	$869.90	$450.00

*One case transferred.[38]

Though this table deals with but three counties and covers but a limited time, it may not be without significance. It should be observed that the court is concerned primarily with civil cases; that its work lightens considerably the work of the circuit court; that from one-half to two-thirds of the cases tried are tried without the use of a jury; that in very few cases are *nolle prosequis* entered; that the docket is kept well up to date; that there are very few cases appealed; and that, considering the work disposed of, the court is an inexpensive one.

Any just appraisal of the county courts must take into consideration their effect upon the burden of the circuit courts. Some idea of this effect may be gathered from the table to follow. This table shows the results of the work of the circuit courts in twenty-four counties—twelve with and twelve without county courts—in regard to costs, cases disposed of, and number of days of court held in each county. The period of time covered is from 1925 to 1928 inclusive—the last two years before county courts were established and the first two years after their establishment.

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38 This information was obtained from the judges of the courts concerned and is from the records made during the months of August (in Jones County), September (in Leflore County), and October (in Lee County), for the year 1931.

TABLE II

	Cost [38a] (Circuit Court)		Cases disposed of		Days held	
	1925-1926	1927-1928	'25-'26	'27-'28	'25-'26	'27-'28
Quitman	$15,648.51	$11,700.15	246	145	80	51
Tate*	$ 5,988.60	$ 5,444.85	119	110	34	20
Tunica	$ 7,136.90	$ 7,118.05	122	91	20	21
Desoto*	$ 9,835.85	$ 9,370.40	136	117	27	20
Coahoma	$33,603.50	$22,139.30	969	392	180	98
Bolivar*	$15,851.80	$20,294.50	533	520	82	70
Lauderdale	$35,654.20	$32,820.55	771	509	197	185
Clarke*	$12,068.90	$15,396.35	237	312	44	52
Jones	$29,126.90	$16,674.17	804	521	268	99
Smith*	$11,480.55	$15,475.17	187	276	30	47
Forrest	$30,936.95	$20,073.80	865	495	218	180
Covington*	$12,702.15	$ 9,346.50	264	155	47	30
Hinds	$28,051.50	$37,910.80	1338	883	153	162
Copiah*	$15,475.05	$14,579.85	464	455	59	44
Yazoo	$ 9,924.40	$10,560.90	312	202	36	32
Madison*	$ 9,937.10	$ 9,790.45	390	500	38	39
Harrison	$24,035.35	$27,387.00	876	532	163	203
Jackson*	$ 5,722.17	$ 9,344.83	230	238	27	34
Leflore	$31,753.55	$23,485.65	647	335	109	94
Sunflower*	$20,472.74	$20,688.90	462	452	90	91
Washington	$19,938.05	$17,648.90	659	335	104	71
Holmes*	$15,045.12	$16,701.03	184	334	54	52
Newton	$11,329.75	$ 7,986.95	262	159	52	44
Rankin*	$ 8,387.10	$ 8,603.45	146	142	27	37

Comparison between Tables I and II must be made with reservations. These tables refer to the operation of different courts at different times and in different places. But one fact stands out. There is a great difference in the costs of county and circuit courts as shown by the tables. The totals show an average daily cost of the county court of $75.47 and of the circuit court of $285.63. One may hazard a guess that this ratio would continue the same were a greater number of courts considered over a longer period of time.

Perhaps more accurate and convincing results of the work of the county courts may be secured by examining Table II by itself, and making comparisons between the last two year period before county courts were established and the first two year period after their establishment and between counties with and counties without county courts. Without a single exception there was a decided decrease in the number of cases disposed of by the circuit courts in county court counties following the establishment of the county courts. This decrease ranged from thirty-one cases, or about twenty-five per cent of the total number for the

*Counties marked * have no county courts but each is a neighboring county of the one immediately above it in the list.

[38a] This information was secured from the report of the Joint Committee on Circuit Redistricting submitted to the Mississippi Legislature in 1930.

first period, in Tunica County to 567, or about fifty-eight per cent, in Coahoma County. In counties having no county courts there was no such variation as a whole. Does this merely signify that the trials for many cases have been transferred from the circuit to the county courts? It may reasonably signify much more than that. It may be that there are now trials for many cases which formerly went untried. The following quotation is of interest in this connection:

> "I was prosecuting attorney of this county for nineteen years, and the greatest drawback to a proper enforcement of our criminal laws was the fact that our circuit court criminal docket was so congested that it was practically impossible to try anyone who appealed from the lower courts, the county and municipal, and we were able to try very few persons who were out on bond, charged with felonies. With the exception of the murder and other capital cases, it was almost impossible to try anything else. The result was that when a bond was made, that was the end of the matter, and our criminals and interested friends rarely ever employed an attorney to represent them beyond the preliminary trial court."[39]

Even this statement does not fully answer the question propounded above, especially when viewed in the light of the statistics given in Table II. In the above writer's county more cases were disposed of by the circuit court before the advent of county courts than were afterward. Nearly one hundred per cent more, in fact. It should be stated, however, that the cases here referred to as disposed of, and indeed those similarly indicated on the table, include cases "summarily disposed of" as well as those actually tried. What probably happened in the writer's county, as well as in the other counties, was that when the dockets became "congested to overflowing" a large number of cases was disposed of "wholesale" by being passed to the files, entering the *nolle prosequi,* etc. This probability is made more manifest by the following item taken from a recent issue of a county paper in a county which does not have a county court (with reference to the circuit court term then in progress in the county): "Ninety-five cases were pending on the criminal docket and thirty-six on the civil. Of the ninety-five criminal cases pending thirty-five of these were disposed of by dismissal, carried to the files or nolle prosed. . . . A large number of civil cases went off the docket by non-suit, dismissal and otherwise, only one im-

39 From a personal letter to the present writer, October 30, 1931.

portant case remaining on the docket to be tried.''[40] It is not in any sense maintained that in counties having county courts the administration of justice has attained the highest stage of perfection. But it is earnestly contended that in view of the facts presented here there is now a more certain and less delayed administration of justice in these counties.

The statistics presented in Table II reveal the further fact that in general a county court tends to reduce the number of days of circuit court in a county and, as a corollary to this, tends to reduce circuit court costs in the county. Comparisons of the number of days of circuit court held in certain counties during the last two years before county courts were established therein with the number held during the two years after their establishment present some rather striking results. Jones county, for instance, shows 268 days for the former period and ninety-nine for the latter. Differences in costs of the circuit court for the two periods range up to above $10,000. There are two notable exceptions to the general trends. Both Harrison and Hinds counties show increases in days of court held and costs of their courts in the two years after county courts were established. Harrison's neighboring county, Jackson, (without a county court) shows similar trends. We might guess, then, that there was a general increase in litigation in the Coast counties, caused perhaps by the ''boom'' in Coast realty and in the increased ''tourist industry.'' Hinds' neighbor furnishes no clue to the solution of the increases there. In fact, Copiah showed just the opposite trends. An examination of the United States Census of 1930 which shows that the population of Jackson, the county site of Hinds county, registered more than a hundred per cent increase from 1920 to 1930, does not fully explain it because both periods covered by Table II come within this decade. But this fact, taken in connection with the rapid industrial growth of Jackson during the last three or four years of the decade, may indicate that the period of 1927-1928 would be expected to furnish more litigation than that of 1925-1926. Yazoo county shows an increase in costs of circuit court in the period after the county court was established although the number of days was smaller. The explanation of this abnormal increase in costs is not apparent. Perhaps it was due to some local situation and could be explained if one were acquainted with conditions locally.

Taking the composite figures as shown on Table II we

40 *Carthaginian* (Carthage, Miss.), Nov. 12, 1931.

get the following results: In the first two-year period after county courts were established as compared with the last two-year period before their establishment, the twelve county court counties show a decrease of fifteen per cent in circuit court costs, a decrease in cases disposed of of 41.8 per cent and a decrease of 27.8 per cent in number of days of court held; whereas the counties without county courts show an increase of nine per cent in circuit court costs, an increase of 4.7 per cent in cases disposed of, and a decrease of four per cent in number of days of court held. On the face of these figures the county courts seem to justify their existence.

Another test of the value of the work of the county courts might be the ratio of their decisions affirmed on appeal. By studying seventy-two cases that have come up from the county courts finally to the Supreme Court of the state some basis for an evaluation of the courts' work ought to be furnished. These cases were decided by the Supreme Court within a period including the fall term of 1927 through the spring term of 1931.[41] In sixty-four of the seventy-two cases the decisions of the county courts were affirmed by the circuit courts. In the eight cases in which affirmance was denied, the latter courts were reversed by the Supreme Court in five cases and affirmed in three. In effect the decisions of the county courts were affirmed in four of these cases and the circuit courts in three.[42] Taking the combined results all three courts agreed in forty-seven cases, the county and circuit courts in sixty-four, the circuit courts and Supreme Court in fifty and the county courts and Supreme Court in fifty-one.[43]

In the five cases in which the circuit courts were reversed after having reversed the county courts, three involved questions of law and the county courts were held as having made the correct applications. One case was reversed by a circuit court on questions of fact alone. The Supreme Court held that the findings of fact by the county court could not be disturbed on appeal unless "contrary to the overwhelming weight of evidence," which it said was not true in the instant case. Finally, one case was reversed on account of the invalidity of an affidavit introduced in the justice of the peace court, where the case originated, and thus the proceedings before both inter-

41 Mississippi Supreme Court Reports, Vols. 148-159.

42 See discussion in last sentence but one at bottom of page.

43 In three cases the circuit courts were reversed in part but were affirmed so far as the merits of the cases were concerned. Hence these cases are listed as "affirmed."

mediate courts were nullified. The three cases in which circuit courts were upheld in preference to county courts were all concerned entirely with questions of law. In these three the county courts were held as having made incorrect applications.

So far as any conclusion can be drawn from this study of reported cases it would seem that the county courts are in no wise inferior to the circuit courts in so far as knowledge of the law, either substantive or procedural, as interpreted by our highest state court is concerned.

There are many testimonials as to the value of the county courts. Two or three brief statements by men in positions that permit them to observe the work and effects of the courts should be of interest. A county judge, a man who has been connected with the court system of Mississippi as judge or prosecutor for nearly a quarter of a century, evaluates the court as follows:

". . . It brings about a better respect for law, because it provides an avenue for the quick settlement of differences and a speedy trial of criminals; it greatly lessens the work of the circuit court; it saves the expense of victualizing prisoners who might otherwise be compelled to remain in jail many months awaiting the convening of circuit court; it lessens the work of the Supreme Court; its existence acts as a deterrent to people inclined to commit unlawful acts with the hope that they will never be forced to trial; it compels the trial of defendants released on bail; it provides for the immediate hearing of habeas corpus writs, without the necessity of going to the home county of a chancellor or circuit judge; and in many other ways warrants its existence."[44]

Another county judge has this to say:

"The county court has proven its worth in this county. It saves the county several times its cost by cutting down the work of the circuit court. Most of the cases are tried without a jury, which cuts the expense, as the juries are the most expensive part of courts. The court is very popular with the lawyers and the litigants since the court meets every month and judgment and trial can be had on short notice. In no case would the lawyers and people generally be willing to do away with this court and many predict that the court will be given extra jurisdiction and in a few years be made the sole court in a county or at least be the only court trying criminal and civil business."[45]

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44 From a letter to the writer, October 30, 1931.
45 From a letter to the writer, November 7, 1931.

A prominent newspaper editor who has been for many years a close observer of politics and administration in Mississippi and whose home is in a county which has a county court, writes:

"The strongest argument in favor of the county court system is that it facilitates the disposal of the odds and ends of litigation in the larger counties, and keeps the circuit court docket from becoming congested with appeals of trashy cases from police and magistrates' courts. In former years more than half of the time of our circuit court was taken up with these appeals. Many of them, of course, were instituted merely to delay justice, and were returned to courts of original jurisdiction on writs of procedendo, but sufficient went to trial to congest the court calendar at a heavy expense to the taxpayers."[46]

That county courts are competent as a whole seems abundantly demonstrated. That they will relieve higher courts of a considerable amount of work seems equally clear. It is doubtful, however, whether these facts alone justify the creation of these new courts. The same ends might have been attained by increasing the number of circuit (and chancery) courts. This could apparently have been done with a great deal more logic and consistency than the present arrangement of "tacked-on" courts offers. As a matter of fact, it would not even have been necessary to increase the number of circuit courts if some method had been worked out whereby "underworked" circuit judges would be required to hold terms of court in districts where the dockets become congested. In the four year period from 1925-1928 inclusive the average number of days of court held by each circuit judge in the state each year ranged from seventy-seven in the third district—consisting of seven counties—to 195 in the fourth district—consisting of five counties. In six districts the annual average was less than one hundred days each.[47] It is quite probable that if a careful study of this situation were made a plan could be worked out which would render county courts entirely unnecessary so far as relieving circuit courts is concerned.

Granting that county courts are not necessary for relieving courts superior to them, there are still other arguments for retaining—and even extending—this system of courts. Such courts assure dignified and competent tribunals at the very base of the judicial system, which after

46 From a letter to the writer, November 11, 1931.
47 Report of Redistricting Committee, op. cit.

all, is the part of the system that touches the greatest number of people. There is little doubt but that the importance of the higher courts has been emphasized at the expense of those at the bottom of the system. But neglect of the foundation members of a system has not been confined to the judiciary. Time was when the most poorly equipped school teacher was thought to be competent to teach beginners in school. Educators learned better. And learning, they changed their practice. Now a good school superintendent wisely selects the very best available teachers for the primary department. People have been slower in realizing the importance of efficient courts for the "beginners in litigation." Nevertheless there is evidence that their importance is now coming to be appreciated.[48]

Unfortunately, reliable statistics are not readily available that would show to what extent, and with what degree of satisfaction, the county courts displace the justice of the peace and municipal courts in Mississippi. It can be said that the various statistics presented above indicate that the county courts are capable of administering justice in a satisfactory manner. It is, to say the least, doubtful whether the same can be shown for the other inferior courts of the state.[49]

It has been well said that: "The just decision of petty cases is the most important task of judicial organization, and a decision of these cases cannot be left to an untrained judge, who will often decide them according to the fees he anticipates, and from whose decision an entirely new trial may be had in a higher court.—The poor litigant cannot afford the expense of a new trial in a higher court in order to escape the injustice of a lower tribunal."[50] Chief Justice Hughes once said that "Justice in the minor courts, effectively and wisely administered, is the best protection for the safety of our institutions."

In Mississippi we require a county health officer to possess a degree in medicine before we allow him to lay a quarantine that may deprive us of a portion of our liberty; we require a county demonstration agent to possess a college degree before we allow him to terrace our farms

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48 See note 11 above; also A. B. Butts, "The Justice of the Peace—Recent Tendencies." 22 American Political Science Review (1928), pp. 946-53; and "Kansas Seeks an Ideal County Court System," 14 Journal of the American Judicature Society (1931), p. 173, and references contained therein.

49 See an article by Judge S. F. Davis in 22 Case and Comment (1915), p. 42; also a report presented to the Forrest County Bar Association by a special committee of the association appointed to investigate practices of extortion by certain justices of the peace in Hattiesburg in 1928.

50 Walter F. Dodd, State Government (1928), p. 326.

in order that we may not be deprived of our property through the forces of nature; but we require neither educational nor professional qualifications of a justice of the peace before we allow him to deprive us of our liberty or property through a real or purported process of law.

The potentialities of the county courts are great. Their weaknesses and shortcomings are legion. Honest men will admit that our entire judicial system is capable of being much improved. But the county courts strike at one of the most notoriously weak spots of the system—that "ancient landmark," the justice of the peace. Hence, it is to be hoped that the county courts will be further studied. If the searchlight of investigation and publicity is turned on them their weaknesses will become more apparent and their virtues more widely known and appreciated. It is possible to strengthen the courts only when we can perceive their weak points. It is probable that the courts will become more general only when their advantages are more widely known. A strong judicial system would undoubtedly add strength to our whole governmental organization. No judicial system can be strong unless it is constructed on a solid base. County courts seem to possess characteristics that qualify them for the foundation stone of our judicial structure. Upon this rock it may be possible to build an edifice that will make the constitutional injunction—"right and justice shall be administered without sale, denial or delay"—otherwise than "as sounding brass and tinkling cymbals."

STATUTES OF DESCENT AND DISTRIBUTION

By E. R. Farris*

Perhaps there is no law on our statute books which has a more far-reaching effect than our law of descent and distribution. All property within the confines of our state boundary sooner or later comes under its operation and ownership vests in the new takers through the beneficent sanction of this law.

We, of course, have no accurate method of determining the space of time required, but it is safe to say that all of the property of the whole state including her lands, factories, railroads, banks, buildings, stocks and bonds will all be acquired by new owners in the space of seventy-five years through the method of inheritance.

Some people are filled with the fear that all wealth is gradually being accumulated in the hands of the few and that even now two per cent of the people own ninety per cent of the wealth. They forget that as sure as fate the inextricable socialistic principle of inheritance has all material things in its clutches. The great massing of wealth is bound to be broken down and broken up. There is some hope in the old adage, "Three generations from shirt sleeves to shirt sleeves." It gives encouragement to some of those who are now in shirt sleeves. I am assuming, in expressing satisfaction with this principle, that the wealth of the country should do the greatest good to the greatest number.

In viewing the important and far-reaching effect of the Statute of Descent and Distribution, it might be well for us to consider whether the law of our own state is entirely in line with equity and good conscience. We are all aware that our legislators have endeavored to provide a law that would pass intestate property in a fair and just manner to those to whom the deceased would in ordinary cases have given bounty in his lifetime.

Conceding that this is a fair statement of the legislators intention, have they accomplished their aim in our present law?

During the past two hundred years it has been developed among English speaking peoples that the surviving spouse has a greater claim on the estate which he or she

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has helped to create than any individual child of the decedent. This principle is recognized in England and in practically all of our states. But in Mississippi the surviving spouse takes equally with the children except the wife is entitled to a widow's award in addition.

For instance, an old man who has lived with his wife forty years. They have worked and, besides the burden of rearing ten children, have accumulated some property. If he dies, his wife will inherit one-eleventh of his estate in addition to her widow's award, and in case she dies having any of their property in her name, the husband will inherit one-eleventh and the children ten-elevenths, although their children may be grown and amply able to provide for themselves and the surviving father or mother in old age and dependent. This cannot therefore be socially or economically sound. On the other hand, if there are no children, the surviving spouse inherits the entire estate, both real and personal. This again is clearly inequitable and out of harmony with the spirit of our laws as reflected in the statutes of practically all the states. Most states, on the death of a spouse to a childless marriage, recognize the rights of the father, mother, brothers and sisters of the decedent.

Through the long years of development of the law in England, the estates by the courtesy and common law dower were evolved and were adopted in many of the states as the rule of descent affecting the inheritance of the surviving spouse. Both of these have been abolished in Mississippi as has the distinction between real and personal property in this statute. We have, therefore, in obtaining simplicity in our rules of descent, worked frequent harsh, unjust and inequitable distribution as between surviving spouse and children and also between the surviving spouse to a childless marriage and the decedent's father, mother, brothers and sisters.

In examining the laws of the various states, we find several of them have recently revised and modernized their statutes of descent and distribution. The common law statutes of dower have largely been replaced by statutory dower or by statutes defining the interest of the widow, eliminating the objectionable features effecting the free and easy alienation of property. Most states have given the widow, in addition to her widow's award, what approximates one-third of all her deceased husband's real and personal estate, if there is more than one child, or one-half of such property in case there is one child, or one-half of

such property in case of no children, with the other portion to the father, mother, brothers and sisters in equal shares.

Property laws enacted in England in 1925 under the leadership of Lord Birkenhead completely revised and modernized the property laws and its rules of descent in that country. The State of New York as late as September 1, 1930 gave effect to a far-reaching revision of its law with respect to distribution of intestate property. Governor Alfred E. Smith in 1929 appointed four prominent surrogates of New York State as a commission in the matter of procuring recommendations for needed reform. This commission made exhaustive studies of the property laws and rules of descent in England and the various states. The result was the adoption of New York's very recent and modernized statutes respecting the devolution of property.

The importance of inequities in statutes of descent should not be minimized by the fact that every individual having a sound mind and memory and above twenty-one years of age may dispose of his property by will as he sees fit, subject to the rights of his spouse to elect to take her statutory share against such will. Comparatively few people write wills. It is my opinion that not more than two per cent of the people have wills and this percentage may be considerably less. The average person gives little consideration to the disposition of his property after death. He may come into contact during his lifetime with the administration of one or possibly two estates. He usually remembers very vividly a few principles of the law of inheritance which he learns through this experience. But there is no chance whatever for a concerted action on the part of the people for any correction or revision in these laws. This must come from the Chancery Judges, the legal fraternity or from the Governor.

It might be asked what dictates the principles upon which a division of intestate property should be made. It is reason and fairness which is written in the heart of every experienced Chancellor in this state. It is a common conviction of justness and equity gained through experience in human relations.

I venture to say that the Statutes of Descent and Distribution for the State of Mississippi do not express the common conviction of the people and should the matter be referred by our new Governor to a commission for study and recommendation they would find that modernizing and revising this law would be highly desirable and in the interest of public welfare.

A DISCUSSION OF THE EXTENT TO WHICH THE CONSTITUTION OF THE UNITED STATES AUTHORIZES A JUDICIAL REVIEW OF THE DECISIONS OF ADMINISTRATIVE TRIBUNALS

By J. C. Satterfield*

Many years ago the rigor and rigidity of the common law became so ill adapted to the demands of the times that there were engrafted upon the judicial system of England the principles of equity. In order to carry out these principles there were created tribunals which were especially suited to their enforcement.

At another period in our judicial history a foreign body of law was engrafted upon that which was then the law of the land. The growth of commerce had reached such proportions that it was necessary that the law of the land be materially changed in regard to this class of human rights and relations. To meet this need the law merchant became a part of our judicial system.

During the last forty years there has been such a tremendous and phenominal increase of governmental supervision and regulation of industry and commerce that there is a change going on at the present time which it would not be exagerating to say approaches the importance of the adoption of the law merchant, and the establishment of equitable principles and equity courts.

At the time of the molding of the principles of equity and of the law merchant into our system of law there was no written constitution with which their principles could come in conflict. Since that time the people of the United States have ordained a written constitution to whose provisions any innovation, whether it be in the nature of executive, judicial or legislative change, must conform. Any change reaching the proportions now attained by the growth of administrative law and administrative tribunals must inevitably come in conflict with the principles and provisions of the Constitution. This paper will be confined to a discussion of one point of contact between the growing body of administrative law and the supreme law of the land.

At the time of the ordaining of the Constitution of the United States it was impossible that its framers could have

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had in mind the creation thereunder of such administrative tribunals as we see on every hand today. As late as 1885 A. V. Dicey said that the words "administrative law" were "unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation."

So rapid has been its growth in the last forty years that, as was said by Judge Rosenberry,[1] there are today administrative agencies regulating public utility corporations, business affected with a public interest, professions, trades and callings, rates and prices; laws for the protection of the public health and safety and the promotion of public convenience and advantage; examining boards and other bodies to pass upon the competency, responsibility of private schools, chauffeurs, engineers, surveyors, private detectives, real estate brokers, stockbrokers, teachers, chiropodists, nurses, public accountants, shorthand reporters, physicians and surgeons, midwives, peddlers, lawyers, dentists, pharmacists, plumbers, undertakers, embalmers, veterinarians, optometrists, architects, beauty parlor operators, employees of the state and its civil divisions, and other professions, trades, and callings; also boards and commissions of education, public service commissions, probation commissions, parole boards, athletic commissions to regulate boxing and wrestling contests, racing commissions, bank examiners, insurance departments, transit commissions, health boards, child welfare boards, tax commissions, tenement house commissions, building commissions, water power commissions, water control commissions, commissions for the blind and mental defectives, recreation commissions, boards of charities, agricultural commissions, workmen's compensation and industrial commissions, boards of child welfare for granting mothers' pensions, motion picture commissions; and in the United States the Interstate Commerce Commission, the Federal Trade Commission, the Railroad Labor Board, the various officers which supervise and regulate internal revenue and many other tribunals and persons who are exercising vast and often ill defined administrative power.

These administrative tribunals did not come because anyone desired that they should be added to the already top-heavy load of governmental agencies. The public views with alarm the fact that the cost of maintaining the federal government is now estimated at three hundred and fifty times what it was during the early days of the Union. Administrative tribunals came as a result of social pres-

1 "Administrative Law and the Constitution," American Political Science Review, Volume 23, page 32, February 1929.

sure, brought about by the increasing complexity of our economic, commercial and industrial relations. There is, in fact, no place for them in our constitutional theory, yet they are here and have been repeatedly upheld.[2]

An interesting constitutional question which can not be discussed within the confines of this paper is that of the existence of the constitutional power of the legislature to set up such tribunals to which are delegated a combination of legislative, judicial, and, in many cases, executive power. The opponents of the administrative system have usually had the better of the argument on constitutional grounds, under the principle of separation of powers and the right of delegation of authority, but the tremendous impact of social pressure and economic necessity upon the yielding framework of the Constitution has caused them to be given a place in our constitutional system.

It is impossible in the narrow limits of this paper to deal fully with even one phase of the vast mass of principles of law which have grown up around the creation, administration, procedure, powers and status of these tribunals. For this reason all other questions except the one constitutional point involved in the subject of this paper will be disregarded. The viewpoint from which administrative finality itself will be regarded will be somewhat different from that used in most current discussions. Neither the expediency, desirability or wisdom of such finality, the usual requirements of review as are now currently in force in the state and national systems, nor the development and nature of the present statutory provisions for various administrative tribunals, will be discussed herein except in their bearing upon a reasonable construction of the constitutional provisions.

In referring to the quasi-judicial and quasi-legislative powers of the administrative tribunals the terms used will some times drop what has now become almost a fiction, i. e., the prefix "quasi," and will be employed in a manner which, although repugnant to the theory, yet is compatible with the actuality. For dispite the nicety of terms which are used it is impossible to forget the fact that many of the powers conferred upon these tribunals are actually judicial and many are actually legislative.

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2 I. C. C. vs. Illinois, 215 U. S. 452, 1910; Intermountain Rate Cases, 234 U. S. 476; B. & O. R. R. vs. I. C. C., 221 U. S. 612, 1917; Atchison, T. & S. F. R. vs. U. S., 244 U. S. 336, 1917; I. C. C. vs. Goodrich Transit Co., 224 U. S. 194, 1912; Pipe Line Cases, 234 U. S. 548; O'Keefe vs. U. S. 240 U. S. 294, 1916.

A distinction between the words "authorized" and "required" should be borne in mind in considering this subject. For instance, the Constitution may "authorize" a complete review de novo in certain cases yet only "require" review as to jurisdiction and constitutionality.

The extent to which the Constitution of the United States authorizes the courts to review the decisions of administrative tribunals will be considered from four general viewpoints, jurisdiction, decisions quasi-judicial in their nature, decisions quasi-legislative in their nature and decisions in rate-making cases.

We find that three great principles of the Constitution are, generally speaking, involved in a consideration of administrative finality. These are: first, the great underlying principle of the separation of powers; second, the due process clause of the Fifth and Fourteenth Amendments; and third, those provisions of the Constitution[3] which confer upon the federal courts jurisdiction to test the validity of acts of Congress and of the state legislatures by the federal Constitution, and require them to disregard and refuse to enforce such statutes as they find repugnant to the provisions of the Constitution. The latter is involved because of the legislative character of many of the decisions of these tribunals.

In discussing the review of administrative decisions the various methods of obtaining review are all included, such as appeal, certiorari, injunction, mandamus, writ of review, etc. Distinction between the applicability of these methods are not here necessary.

The simplest question presented is where there is involved a question of the jurisdiction of the tribunal to deal with the subject matter involved or to render the decision made. Whether the decision in question be judicial or legislative in its nature, where the fact determined shows as a matter of law that the act is ultra vires, it is void and may be so declared on review. No court, save that of final authority, has the power to be the arbiter of its own jurisdiction.[4] Likewise no legislative body has the power to determine for itself whether or not its acts are within its constitutional powers, or whether or not the requirements of the statute passed or rates fixed by it are a reasonable

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3 Article 6, paragraph 2; Article 3, Sections 1 and 2.

4 Laird vs. B. & O. R. R. Co., 121 Md. 179; Stone vs. N. J. & C. R. R. Co., 62 Mississippi 646; People ex rel N. Y. R. R. Co. vs. Pub. Service Com., 223 N. Y. 373; Noble vs. Union River Logging R. R. Co., 147 U. S. 165; Interstate Commerce Commission vs. Humboldt S. S. Co., 224 U. S. 474, 1912; Gegiow vs. Uhl, 239 U. S. 3, 1915.

exercise of its powers under the due process clause.[5] The jurisdiction and powers of an administrative tribunal are to be ascertained by the construction of the statute by which it was created as well as of the Constitution itself. In these cases the power of the courts appears to be that of confining the administrative body within the limits of the authority conferred upon it. The right of review here is not only authorized, but required, by the Constitution, for the taking of property by a tribunal without authority is a taking without due process of law.

When the jurisdiction of the administrative tribunal depends upon the existence of certain facts, and these facts necessarily form a part of the administrative decision, there is more room for doubt. Under the reasoning of the Ju Toy Case[6] it appears that while such determinations of fact are quasi-judicial in their nature and so subject to review by the courts, yet where under the statute the requirements of due process are observed and there is evidence upon which the finding may be based, the decision MAY be made final and conclusive consistent with due process, although the court itself would have found differently.

Since the rendering of this decision in 1905 it has been distinguished and qualified to such an extent that it can hardly be taken to be the law today. In the case of *Kwock Jan Fat vs. White*[7] the former decision was largely qualified. In a still later case, that of *Ng Fung Ho vs. White,*[8] it was held that a person in the United States who claimed that he was a citizen could not, without violation of the due process clause, be deported as an alien without a judicial, as distinguished from a mere administrative, trial of the fact of citizenship. In this case the Ju Toy case was attempted to be distinguished. The turning point of the decision seemed to be contained in the following: "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact." Therefore the writer contends that the correct principle is that where an essential jurisdictional fact is denied in a matter which involves a constitutional right, such as the taking of property without due process of law, or the right of

5 Stone vs. N. J. & C. R. R. Co., 62 Mississippi 646; Railroad Commission Cases, 116 U. S. 307; Reagan vs. Farmers' Loan & T. Co., 154 U. S. 362; Covington, etc. Co. vs. Sandford, 164 U. S. 578; Smyth vs. Ames, 169 U. S. 466; Northern Pac. R. Co. vs. North Dakota, 236 U. S. 585, L. R. A. 1917F, 1148; Norfolk Ry. Co. vs. Conley, 236 U. S. 605.

6 198 U. S. 253, 1905.

7 253 U. S. 454, 1920.

8 259 U. S. 276, 1922.

citizenship, the due process clause itself authorizes a complete review of both law and fact.

All of the subsequent discussion is to be taken as limited by that concerning jurisdiction and constitutionality.

Although the review of discretion is largely confined to executive officers rather than administrative tribunals, it would be well to note one or two general rules. Generally it may be said that unless there has been a tyrannical or arbitrary abuse of discretion, through fraud, malice or discrimination, judicial review will be very limited. It will be limited largely to whether or not the administrative official or tribunal has acted within the scope of his authority.[9] Where an administrative officer or tribunal is vested with discretion to determine a question of policy, that discretion can not be exercised by the courts, and any attempt so to do would be a usurpation of the functions of another department of the government.[10]

Before going into a discussion of the extent of review authorized over the decisions of administrative tribunals which are quasi-judicial and quasi-legislative in character, it would be well to distinguish between the review of the courts in the cases of purely judicial and legislative acts. In the former case the lower court has decided a past controversy according to law, i. e., has applied the law. This includes findings of facts as to the controversy, and findings of the law which was applicable. The reviewing court reviews the actual findings of law and determines whether or not it would have so found them. Ordinarily as to findings of fact, it determines only whether they are supported by evidence. While this is ordinarily true of appellate courts, yet it must be remembered that from the viewpoint of this paper the Constitution AUTHORIZES a complete review de novo of both law and facts coming up to intermediate appellate courts from courts of original jurisdiction. On the other hand it must also be remembered that the right of review is historically a matter of privilege and not of right, and that if the requirements of due process are complied with in the lower court, then a review is not REQUIRED and its finding of both law and fact may be made

9 (Some of these cases touch upon executive action, but serve to illustrate the principle.) International Contracting Company vs. Lamont, 155 U. S. 303; Kendall vs. U. S., 12 Pet (U. S.) 523; Decatur vs. Paulding, 14 Pet (U. S.) 497; Dunlap vs. Black, 128 U. S. 40; Noble vs. Union River Logging Co., 147 U. S. 165.

10 German Alliance Ins. Co. vs. Lewis, 233 U. S. 389; C. B. & Q. R. R. Co. vs. McQuirne, 219 U. S. 549; St. Louis Independent Packing Co. vs. Houston, 231 Red 779; I. C. C. vs. Waste Merchants Assn., 23 Sup. Ct. Rep. 6.

final and conclusive without review of any kind, except on a question of constitutionality or of jurisdiction.[11]

Judicial review, when used with reference to legislative acts, is the power of a court to pass upon the validity of the acts of a legislative body when compared with the "higher law" of the Constitution. As to such acts of administrative tribunals the phrase "higher law" includes the statute which gives the tribunal being.

The legislature has laid down a rule or policy for the future, i. e., has made law. The court does not determine whether it should have so legislated, but merely passes upon the constitutionality of the act. The reviewing court simply in the process of applying law determines whether the law supposedly made by the legislative body is actually law, that is, whether the legislature had the power to do the act which it attempted to do.

This review, however, is broadened by the application of the due process clause, for this clause limits the substance of legislative action. An arbitrary law affecting life, liberty or property is unconstitutional where a more reasonable one would not be, and the COURT is the judge of whether or not such regulation is reasonable.[12] Of course, due weight is given the decision of the legislature, but it is not final and conclusive. But the court can not usurp the functions of the legislature by attempting to make laws or by substituting their judgment, except as to due process, for that of the other branch of the government.[13] The knowledge, negligence, methods or motives of the legislature will not be inquired into in determining the validity of a statute passed in due form.[14]

It would be tedious to attempt to list the various decisions of administrative tribunals which are quasi-judicial and those which are quasi-legislative in their character. Among those quasi-judicial in character are reparation suits,[15] the determination of controversies under the Workmen's Compensation acts, the valuation of property for as-

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11 An example is the final, though original, jurisdiction in this state of the Circuit Courts of matters involving less than fifty dollars, from which a direct appeal may be to the Supreme Court of the United States if the requisite constitutional issues are involved.

12 Stone vs. N. J. & C. R. R. Co., 62 Miss. 646; Jacobson vs. Mass. 197 U. S. 11; Smyth vs. Ames, 169 U. S. 466; Holden vs. Hardy, 169 U. S. 366.

13 Hunter vs. Pittsburg, 207 U. S. 161.

14 Calder vs. Mich. ex rel Ellis, 218 U. S. 591; Finkbine Lumber Co. vs. G. & S. I. R. Co. (C. C. A. 5th Cir. 1920), 269 Fed. 933; B. & O. R. Co. vs. Lambert R. Co. (4th Circuit, C. C. A., 1920), 267 Fed. 776.

15 Penn. R. Co. vs. International C. M. Co., 230 U. S. 184; Dunsenberry vs. Lehigh Valley R. Co., 268 Fed. 1009.

sessment of taxes,[16] the determination whether or not specific persons are qualified to practice the professions under the existing law or requirements, etc., etc. These include all decisions of the tribunals which determine the rights then existing between the parties, or which apply the then existing law or regulations to the facts as proved by evidence, and do not include the making of regulations or rules for the future conduct of parties.

Into the review of these decisions the doctrine of the separation of powers does not enter, for their review is in the nature of the review of the judgment of a court of original jurisdiction by an appellate court, or a trial de novo in the higher court (as in the case of appeal from the justice of the peace court in this state to the Circuit Court). The question of due process, however, does not enter strongly into this class of cases.

In these decisions there must be notice and a hearing somewhere along the line. It is not necessary for due process that this hearing be actually in a court of justice, for an administrative hearing is sufficient.[17] A single hearing is enough, and when this hearing is such as to satisfy the requirements of due process, the right of appeal and review is not necessary.[18] The nature and necessity of the hearing are governed by the general principles such as whether the action be summary, as in questions of taxation and revenue,[19] the guardianship of the health, morals, safety, of the people under the police power,[20] the findings of public utility commissions,[21] etc.

The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with that introduced. It has been often decided that orders of the tribunals of that character must be supported by evidence.[22] To refuse to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence is arbitrary ac-

16 Gulf Company vs. Adams, 85 Miss. 772, 38 South 348.

17 Den ex dem. Murray vs. Hoboken Land & Improv. Co., 18 How. (U. S.) 272; Davidson vs. New Orleans, 96 U. S. 97; Ex parte Wall, 107 U. S. 265; Dreyer vs. Illinois, 187 U. S. 71; Hurtado vs. California, 110 U. S. 526.

18 McKane vs. Durston, 153 U. S. 684; Andrews vs. Swartz, 156 U. S. 272; Pittsburgh C. C., etc. vs. Backus, 154 U. S. 421.

19 Murray vs. Land Co., supra; Springer vs. U. S., 102 U. S. 586.

20 North. Amer. Cold S. C. vs. Chicago, 211 U. S. 306; Hutchinson vs. Valdosta, 227 U. S. 303; Lawton vs. Steele, 152 U. S. 133.

21 U. S. vs. B. & O. R. R., 226 U. S. 14; Chicago M. & St. Paul R. R. vs. Minnesota, 134 U. S. 418; Oregon R. Co. vs. Fairchild, 224 U. S. 510.

22 The Chicago Junction Case, 264 U. S. 258; Peoria & P. U. R. Co. vs. U. S., 263 U. S. 528; I. C. C. vs. Louisville & N. R. R. Co., 227 U. S. 88; Lehigh Valley R. Co. vs. U. S., 243 U. S. 412.

tion, and an order so made must be reviewed by the courts.[23] Where it is alleged that an order was rendered without evidence to support it and there is apparent basis for the contention, the question there made presents not a question of fact, but one of law, which is one for the courts to examine and decide. However, an order based on conflicting evidence is not arbitrary, and the courts will not examine the facts under the present statutes further than to determine whether there was substantial evidence to support the decision.[24]

If the tribunal is so constituted and carried out that these requirements of due process are fulfilled, then under the usual procedure in the courts there might be the review of the questions of law, with conclusive effect given to findings of fact based on adequate evidence, i. e., the finding of the tribunal would be given the same weight as the finding of a chancellor or jury. On the other hand as to the extent to which review is AUTHORIZED, in such cases the statute MAY provide that the trial in the courts shall be a trial de novo, that thereby all questions of fact and law are re-opened, new evidence introduced, and the entire case retried on all matters. Under the Hepburn Amendment of 1906 an intermediate course is taken in review of the decisions of the Interstate Commerce Commission in reparation cases, for in these cases the ultimate facts found by the commission are taken to be prima facie correct (see Scction 16 of the act). But questions preliminary to these and which are administrative in character, and are evidential facts and such findings, with exceptions, chiefly as to questions of law, are conclusive and will not be reviewed.[25]

If the tribunal is so constituted or conducted that there is not a sufficient notice and hearing and the due process clause is therefore not complied with, then an attempt to limit the review of questions of fact will be unconstitutional and void as the taking of property without due process of law. As stated above, however, if all the requisites of due process are complied with by a tribunal which is competent to pass upon the validity and weight of the evidence and to render a decision in conformity with the rights and interest involved, the review may be limited to constitutional and jurisdictional questions.

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23 Florida E. C. R. Co. vs. U. S., 234 U. S. 167; I. C. C. vs. Louisville & N. R. Co., 227 U. S. 88.

24 I. C. C. vs. Union P. R. Co., 222 U. S. 541.

25 Meeker vs. Lehigh Valley R. Co., 236 U. S. 412; Mills vs. Lehigh Valley R. R. Co., 238 U. S. 473; Spiller vs. Atchinson, etc., Co., 253 U. S. 117.

One of the latest pronouncements of the Supreme Court of the United States upon this question is the case of *Lehigh Valley Railroad Company vs. Board of Public Utility Commissioners*[27a] which involved the construction of a New Jersey statute, and the review of action of the Board of Public Utility Commissioners. This case involved the order of such board requiring the railroad company to eliminate two railroad grade crossings in accordance with a plan adopted by the board, which would entail a total cost of $324,000.00. Among the contentions advanced was that such an order confiscated the property of the railroad company, and denied it the equal protection of the laws. It was also contended that the statute impinges upon the constitutional rights of the company, because it makes no provision for appeal from the decision of the board of public utilities to a court with jurisdiction judicially to determine independently on the law and facts whether the property of the company is being confiscated in violation of the 14th Amendment to the Federal Constitution. The statute only provided that review might be had by certiorari.

On the first question the Supreme Court said, "It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board of extravagant in the light of all the circumstances, in the view of the importance of the crossing, etc. . . . . it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits."

Upon the question of the adequacy of review the Court held that a statute authorizing a commission to require railroads to eliminate grade highway crossings is not unconstitutional for failure to provide for a judicial determination of the question whether the property is being unconstitutionally confiscated, where the statute provides for a review and annulment of the order by certiorari, when it clearly appears that there is no evidence to support the order, which is interpreted by the state court in the light of the Constitution to give the court power to examine the facts and the law independently as to the justness and reasonableness of the order, the weight to be given the finding of the commission being stated as follows: "All

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27a Lehigh Valley R. Co. vs. Board of Public Utility Comrs., 278 U. S. 24, 73 L. Ed. 161.

these considerations lead us to the conclusion that if there is any presumption in favor of the order of the commissioners, it depends like the opinion of the court of another state upon the strength of the reasoning by which it is supported. This is subject, however, to the qualification that in legislative action the courts will not merely substitute their judgment for that of a legislative body. We must, therefore, determine for ourselves upon all the evidence whether the former fate in the Passaic district was unjust and unreasonable and whether the new rate is just and reasonable."

There are other functions of the administrative tribunals of today which are legislative in character, and which therefore are governed by an entirely different set of principles concerning review by the courts. As illustrative of this class of administrative decisions or orders are the powers to prescribe uniform accounts,[26] the making of health regulations, the fixing of qualifications for the admission to practice the various professions, the laying out of zoning districts, etc.

Here the principles outlined above as to the review of legislative action by the courts come into play. Indeed the method of review here should be governed by principles analagous to those governing a bill in equity to enjoin the enforcement of a statute alleged to be unconstitutional. Speaking of the right of review by the courts of such action the Supreme Court said,[27] "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity." The review of such decisions would, generally speaking, include the question of law whether or not, first, the statute by which it was created is constitutional; second, that it acted within its statutory authority; and third, that the tribunal shall not have acted in such an arbitrary way as to deprive a party of his legal or constitutional rights,[28] or in such a manner as to amount to an abuse of discretion.[29] The determinations of a legislature, or of an administrative tribunal acting in a quasi-legislative capacity, are always accorded great weight and allowed

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26 I. C. C. vs. Goodrich Transit Co., 224 U. S. 194.

27 Bacon vs. Rutland, 232 U. S. 134, 1914.

28 Seaboard Air Line R. Co. vs. U. S., 254 U. S. 57; Manufacturers R. Co. vs. U. S., 246 U. S. 457; Lehigh Valley R. Co. vs. U. S., 243 U. S. 412; U. S. vs. Union P. R. Co., 234 U. S. 495; Proctor & Gamble Co. vs. U. S., 225 U. S. 282.

29 U. S. vs. Baltimore & O. R. Co., 225 U. S. 306 I. C. C. vs. Diffenbaugh, 222 U. S. 42.

to range within a wide latitude of discretion, and in many fields they are treated as practically conclusive unless patently arbitrary. But when the invasion of vested rights is concerned, such as whether the compensation provided by the statute constitutes just compensation for property taken for public use, or whether rates are reasonable and not confiscatory, the courts often interfere with greater freedom on the principle that such determination is a judicial inquiry.[30]

For a more complete discussion of the review of decisions of a legislative nature, and the question of a "confiscatory" order, see the treatment of the review of rate-making orders given below.

It has been well said that the judiciary does not exercise any supervisory authority over the acts of the other two branches of the government and all determinations which are within the power of the legislative and executive branches, including the exercise of such powers by administrative tribunals, should be reviewed by the courts only when a justifiable question is involved and then they should consider only that which comes within the judicial power. Under no form or pretense can legislative power be conferred upon the judiciary, or judges charged with the performance of legislative duties. Should the courts have their supervisory power enlarged to include matters of executive and legislative decision and discretion, whether exercised by the primary legislative body itself or by a quasi-legislative tribunal, the fundamental principles of our constitution have been violated. In conclusion it may be said that the review of jurisdiction, constitutionality, and reasonableness as related to the due process clause, are not only authorized, but required by the Constitution in decisions of legislative nature.

We now come to the most difficult question to be faced, and that is the extent to which the courts are authorized by the Constitution to review the rate-making functions of administrative tribunals. The difficulty lies in the controversy which rages around the question whether or not such decisions are of a judicial or legislative nature, and if the latter, whether or not part of the decisions made in reaching a final rate are judicial and so subject to a judicial review.

Historically rate making is strictly legislative in character. Before the creation of administrative tribunals the

30 Monogahela Nav. Co. vs. U. S., 148 U. S. 312; Stone vs. N. J. & C. R. R. Co., 62 Miss. 646.

rate making functions were often exercised by the legislative bodies themselves. As an illustration of this might be taken the famous case of *Munn vs. Illinois,*[31] in which the legislature itself had undertaken to fix rates for the great grain elevators of Chicago.

The theory of the Supreme Court of the United States has several times been materially modified with reference to the rate-making power. The initial view taken is illustrated by the words (though dicta) used by the Chief Justice Waite in the Munn case, supra, when he said, "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not the courts." This same view is repeated in *Peil vs. Chicago,* supra, where the same justice says: "Where property has been clothed with a public interest the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."

The power of the legislature to fix rates, and also of administrative tribunals to whom this power has been delegated to do likewise, has been repeatedly upheld. But soon the Court came to the conclusion that not only could it decide the constitutionality of the action, but that it might review the substance thereof also, i. e., whether or not the rates themselves were reasonable.

Ten years after the Munn case the initial doctrine was limited by Chief Justice Waite himself, who stated,[32] "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

Finally in the case of *Chicago, etc. Ry. Co. vs. Minnesota*[33] "Neither the legislature nor such commission acting under the authority of the legislature can establish . . . . a tariff . . . . which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business on the one hand nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for

31 94 U. S. 113, 1876; see also Chicago Ry. Co. vs. Iowa, 94 U. S. 155, 1876; Peik vs. Chicago Ry Co., 94 U. S. 164, 1876.

32 Railroad Commission Cases, 116 U. S. 307, 1886.

33 134 U. S. 418, 1890.

the use of such transportation on the other. In either of these classes of cases there is an ultimate remedy . . . . in the courts, for relief against such oppressive legislation."

The Supreme Court of our own state early established this principle. Although the statute which it was construing provided that the findings should only be prima facie, yet the following extract from the opinion in the *Stone vs. N. J. & C. R. R. Co.* case[34] indicates its attitude: "The final test of the reasonableness of the rates is not with the railroad commission, but, as before, with the government through its judiciary. Fixing rates by the commission is not final and conclusive against a railroad company. It is only prima facie correct and may be tested in the courts. . . . . The appellee is not subject to the absolute control of the railroad commission or of the legislature as to rates for transportation. It has rights which must be respected, and there has been no invasion of them. They are inviolate and inviolable."

Having established the principle that the courts must decide the reasonableness of the rates fixed by the legislature or administrative tribunal, the question next arose as to the extent to which this review would go in the determination involved. It was universally held that there is a necessary right to review pure questions of law (see discussion of jurisdiction and constitutionality above) but the right of review of questions of fact and the review of evidence is still beclouded.

A series of cases[35] seemed to announce the doctrine that judicial review of questions of law, with conclusive effect given to findings of fact based on adequate evidence, is sufficient. Some of the reasoning in these decisions indicates a tendency on the part of the court to look upon this function as partaking of a judicial nature.

On the other hand the court said in *Louisville & Nashville Ry. Co. vs. Garrett,*[36] "The appropriate questions for the court would be whether the commission acted with the authority duly conferred by the legislature, and also, so far as the amount of compensation permitted by the prescribed rates is concerned, whether the commission went beyond the domain of the state's legislative power and violated the constitutional rights of property by imposing confiscatory requirements." This statement clearly looks upon the act

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34 62 Miss. 646.

35 People vs. McCall, 145 U. S. 345, 1890; I. C. C. vs. I. C. Ry. Co., 215 U. S. 452, 1910; I. C. C. vs. Union Pacific Ry. Co., 222 U. S. 541; I. C. C. vs. L. & N. R. R. Co., 227 U. S. 88, 1913.

36 231 U. S. 289.

as a whole as being quasi-legislative in character, and subject to review only as such.

Finally, forty-four years after the decision of the Munn case, the Supreme Court departed from the initial line of authority and held, in the case of *Ohio Valley Co. vs. Ben Avon Borough*,[37] that the state must provide a fair opportunity for submitting the issue of confiscation, if claimed, "to a judicial tribunal for determination upon its own independent judgment as to both law and facts." But the dissenting opinion therein holds that the claim of confiscation does not require the court to give more than a review of questions of law.

Although authorities have placed varying constructions upon this opinion, much protest was raised after its decision for it seemed to open broad the doors of the courts to determination of questions hitherto thought administrative in character. The general theory of the majority opinion seems to have been materially weakened in later cases. The court said in the case of *Western Chemical Co. vs. U. S.*[38] "The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law." This indicates that even if the weight of evidence were against the finding of fact of the commission, such as upon the value of the property of a railway, or the earnings from a particular rate, its findings would nevertheless be given conclusive effect if there is substantial evidence to sustain them. This is certainly inconsistent with the decision in the Ohio Valley case, although that case was not cited therein.

Our own state Supreme Court has spoken emphatically upon the question of the nature of the rate-making function in the case of the *Cumberland Tel. & Tel. Co. vs. State*[39] in which it said, after a review of authorities, "We will only say that it seems clear to us that it (the order of the Railroad Commission fixing rates to be charged for the future) was a legislative act applicable only to the future—was not a judicial decision of a past or present fact in controversy and demanding adjudication." Speaking of the classification of railroads for taxation through the fixing of their valuation the court said, "On a careful review of

37 253 U. S. 287.

38 271 U. S. 268; see also Chicago, R. I. & P. Ry. vs. U. S., 272 U. S. 29; Virginia Ry. vs. U. S., 272 U. S. 658.

39 135 Miss. 835, 100 So. 378, 1924.

the Gulf Company case[40] it will be observed that the commission was there adjudicating a present or past fact, in that it decided the classification of the railroad for privilege taxes. There was a dispute and a judgment there; an administrative or legislative order here. The board did not undertake to fix any rates of taxation, but merely determined the class of the railroad for privilege taxation, which taxation was fixed upon that class by the legislature, and not the commission. This was the exercise of a quasi-judicial jurisdiction."

The rate-making function, therefore, historically, on principle, and by weight of authority, should be taken to be legislative in its character and subject to review only to the extent that a legislative act would be. Although the Ohio Valley case seems to hold otherwise, it is submitted that the finding of the valuation of the property of the railroad or other company by the commission upon which the rate is based, should be final where the procedure below is consistent with due process. In that case the only review as to valuation should be whether or not the valuation is so unfair or unreasonable, ignoring established principles and incontestable facts, that it is in itself an arbitrary finding.

Where the finding of valuation is not unreasonable and arbitrary, although the court itself would have found differently, the facts should not be reviewed. This is true although a slight change in valuation might make the rate itself unreasonable in relation thereto. The valuation not being arbitrary, and the rate fixed not being confiscatory in relation to the valuation found, the finding of the tribunal should be conclusive, matters of constitutional and statutory jurisdiction always excepted.

Were the courts to be allowed to review all of the facts and determine the valuation for itself, and then upon this new valuation determine the reasonableness of the rate fixed, they would, in fact, be vested with administrative and legislative power; the administrative tribunals would be reduced simply to arms of the court for collecting testimony, and the courts would be thrown wide open to a multitude of controversies not properly falling within the judicial powers. Through the medium of review the courts would be indirectly vested with administrative and legislative powers with which it would be patently unconstitutional to directly vest them.

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[40] Gulf Co. vs. Adams, 85 Miss. 772, 38 South 348.

Speaking in general terms, the limitations upon administrative finality may be summarized as follows:[41]

1. The acts or decisions must be in conformity with the "higher law," i. e., the statute itself must be constitutional and the tribunal must have acted within its constitutional and statutory powers.

2. If the acts or decisions of the tribunal are exercised in an arbitrary, unreasonable, or unjust manner, or there is a taking of property without due process of law, as when rates are so low as to be confiscatory, then review must be had.

3. If there is no hearing where a hearing is required, or the decision is contrary to the evidence or not based on evidence, a review is necessary. But if there is an administrative hearing fully conformable to due process and before a tribunal competent to pass judgment, due process is not violated because the finding is made final and conclusive, subject to the limitations just mentioned.

4. The extent of judicial review varies according to the nature of the matter involved. Where it is a matter of taxation, the government is extending a bounty, or aliens are being admitted, the judicial review is more limited. But where vested rights or personal liberties are involved, there must be a more extended review and more rigid conformity with due process.

5. Speaking generally, rate-making orders should be reviewed by the courts to determine whether they were made without a hearing, were unsupported by evidence, exceeded the statutory or constitutional limits, or were the result of arbitrary, unreasonable, discriminatory or abusive action.

This paper having already been drawn to a too extended length the opinion of the writer as to the desirability of administrative finality, because of its affect upon the judiciary and upon industrial and commercial relations, will not be given, nor will a review of the holdings of the Supreme Court in construing present statutes be made.

AUTHORITIES USED IN PREPARING THIS PAPER

"Administrative Finality," by Samuel C. Wiel, 38 Harvard Law Review 447, February 1925; "Judicial Review of Commission," by Laurence Curtis, 2nd, 34 H. L. R. 862, June 1921; "Judicial Review of Administrative Action," by E. L. Albertsworth, 35 H. L. R. 127, December 1921; "Administrative Tri-

[41] I. C. C. vs. Illinois Central R. Co., 215 U. S. 452; I. C. C. vs. Union Pacific R. Co., 222 U. S. 541.

bunals,'' 36 H. L. R. 583, March 1923; ''The Ohio Valley Water Case and the Valuation of Railroads,'' by John G. Buchanan, 40 H. L. R. 1033; ''The Task of Administrative Law, by Felix Frankfurter, University of Pennsylvania Law Review, May 1926; ''Judicial Review of Decisions of the Interstate Commerce Commission,'' by A. M. Tollefson, 11 Minnesota Law Review, 504; ''The Right to a Judicial Review in Rate Controversies,'' by Ernest Freund, 27 West Virginia Law Quarterly 207; ''Administrative Law and the Fear of Bureaucracy,'' by John Dickinson, American Bar Association Journal, October 1928, page 513, November 1928, page 597; ''Public Service Commissions,'' by William D. Guthrie, American Bar Association Journal, July 1928, page 359; ''Judicial Control of Official Discretion,'' by John Dickinson, American Political Science Review, Volume 22, page 275; ''Administrative Law and the Constitution,'' by Judge M. B. Rosenberry of the Wisconsin Supreme Court, American Political Science Review, Volume 23, page 32; Review by Judge Pound of ''Administrative Justice and the Supremacy of the Law in the United States,'' 41 H. L. R. 114.

THE NEWLY ORGANIZED NATIONAL CONFERENCE OF BAR EXAMINERS

By Will Shafroth, Secretary

A new organization called the Conference of Bar Examiners was formed at the time of the recent meeting of the American Bar Association in Atlantic City, and as it will doubtless have some significance in the future course of legal education, an account of its actions seems worthwhile. This conference met at the call of an organization committee appointed by the Chairman of the Section of Legal Education and Admissions to the Bar of the American Bar Association. Various attempts in the past to form an organization of this kind have met with only temporary success. In 1898, when only twelve states had Boards of Bar Examiners, delegates from eleven of them met at the time of the American Bar Association meeting, and an organization which they formed was kept alive during the next two meetings but then died out. A subsequent attempt in 1904 met a similar fate. Meetings in 1914 and 1916, under the auspices of the Section of Legal Education and Admissions to the Bar, were not of sufficient vitality to perpetuate themselves.

In spite of this somewhat discouraging history, the Conference which met at Atlantic City has gone ahead to organize on a permanent basis, and expects not only to have a yearly meeting but also to function during the entire year as an aid to Boards of Bar Examiners and as a clearing house to assist them in solving particular questions.

The objects of the Conference may be briefly set out as follows:

(1) To improve the standards of general education and legal training of candidates for admission to the bar.

(2) To bring about a more thorough investigation of the character of the applicant as regards his fitness to practice law.

(3) To bring about better methods of ascertaining the knowledge and fitness of candidates who have already been admitted to the bar of some other state.

(4) To improve the quality of bar examinations as a whole and their reliability as a test of the legal knowledge of the candidate.

Under the organization which was adopted by the Conference, the membership will consist of delegates from

State Boards of Law Examiners and from character committees. The officers provided for are a Chairman and a Secretary-Treasurer, to be elected at the annual meeting which will be held at the time of the American Bar Association meeting. The Executive Committee which will govern the affairs of the Conference is appointed by the Chairman to serve for one year, and consists of five members including the Chairman's predecessor in office. The Chairman and Secretary-Treasurer are ex-officio members of this committee.

The matter of raising funds for the carrying on of a permanent organization is placed in the hands of the Executive Committee with permission to solicit financial support from the states. It will thus be seen that the Conference is a separate organization from the Bar Association, formed somewhat along the same lines as the Association of Attorneys General, who also meet with the American Bar Association.

The Conference meeting was presided over by Mr. Philip J. Wickser of New York, Chairman of the organization committee, and the attendance of about sixty represented more than half the states of the Union. Mr. Wickser's paper on "Ideals and Problems for a National Conference of Bar Examiners" surveyed the field of the work of the conference as well as the task of individual bar examiners. His opinion of the part which such an organization can take in the general field of legal education is worth quoting:

"An active and industrious National Association of Bar Examiners has a distinguished role to play. Indeed, without the benefit of its experience and its findings no advancement in the whole field of legal education can take place entirely free from guess work. The law schools through their association or through a general questionnaire, could do the same. The Section (of Legal Education and Admissions to the Bar) could insure publicity and debate, and, through the Assembly, the Local Councils and the Conference of Bar Association Delegates of the American Bar Association, could develop a thorough cross-section of professional opinion, within a comparatively short time. 'Would not a recommendation,' says Mr. Alfred Z. Reed of the Carnegie Foundation, 'which might thus emerge in its final form, be more likely to be approved by state and local associations, and to result in action by legislatures and courts, then the impatient efforts of unrelated agencies, each trying to short-cut everything because each is so perfectly sure it is right?' It does not seem hard to agree with him.

"To be sure, such an idea implies a degree of professional

integration beyond anything we now have, an idea, indeed, itself not everywhere welcome. Integration, however, is not quite so far away as some may think. We are rapidly being compelled to integrate by outside forces, most of which are ultimately economic, and, correspondingly powerful. We live in an age in which groups compete and individuals fall into line. The unit of thought is now some multiple of the individual; the unit of action, some consolidation of individual energies. The logic of events, in this new and crescent day, compels it. From this logic we shall not escape.

"Do we want to escape it? I do not think we do. As we do our part we shall see other agencies, each with its special contribution to make, doing theirs. Nodding acquaintance will ripen into friendly partnership. New patterns of thought, and, then, of action, will emerge, over-mastering old difficulties. And if we build well, our reward shall be a sense of achievement, and of satisfaction, beyond that which any of us, individually, can possibly hope to attain."

Dean Herbert F. Goodrich of the University of Pennsylvania, President of the American Association of Law Schools, read a very interesting paper entitled "Bar Examinations and Legal Education," and Mr. Stanley T. Wallbank of the Colorado Board of Examiners discussed "The Function of Bar Examiners."

A resolution, introduced by Mr. A. G. C. Bierer of Oklahoma, to the effect that it was the sense of the meeting that an examination in or separate questions on professional ethics should be included in every bar examination, was referred to the Executive Committee.

Very interesting round table discussions among the Examiners were held the same evening on subjects of particular interest to them, such as "Character Examination for Admission to the Bar," "The Overcrowding of the Bar," and "Types of Bar Examination Questions."

The officers of the Conference are: Chairman, Mr. James C. Collins, Chairman of the Board of Law Examiners of Rhode Island; and Secretary-Treasurer, Mr. Will Shafroth, Adviser of the Section of Legal Education and Admissions to the Bar. The Executive Committee consists of Mr. A. G. C. Bierer, Jr., of Oklahoma, Mr. Stuart Campbell of Virginia, Mr. Philip J. Wickser of New York, and Mr. Stanley T. Wallbank of Colorado.

From the enthusiasm which was generated at this meeting, it is apparent that this conference is going to continue to function and to play an important part in the development of increased efficiency among the individual State Boards of Examiners.

THE PROPOSED BAR UNIFICATION ACT

Jackson, Mississippi
September 2, 1931

Hon. W. W. Venable, President
Mississippi State Bar Association
Clarksdale, Mississippi
Dear Judge Venable:

The committee appointed at the last meeting of the State Bar Association to draft form of bill to be submitted to the next legislature to provide for the organization of the Mississippi State Bar herewith submits such draft, every provision of which has been approved by a majority of the committee. The bill the committee proposes is analogous, in a general way, to measures adopted in other states. It is different, however, in that we do not propose to control admissions to the bar nor to give the organization final authority to suspend or disbar attorneys.

If this draft should be approved by the legislature and enacted into law every attorney admitted to practice would have to be a member of the organization.

The organization would have an office, with a secretary in charge, functioning every day in the year and a governing board ready to act as a body or through a committee at any time. The annual fee of $5.00 we think will pay the expenses of the organization.

There are two features of the plan submitted to which we direct attention:

(1) The governing board will be representative of the entire bar. In order to have a voice in the selection of the member from his district an attorney will not have to attend the annual meetings of the organization. He may send his ballot to the secretary. The attorneys resident in any district may elect the man of their choice without attending the annual meetings. We thought it best to make the Board representative in character even though the membership thereof should be larger than would otherwise be desired.

(2) The right of attorneys to be protected from publicity on account of frivolous or groundless complaints is carefully guarded.

Very respectfully,
J. N. FLOWERS, Chairman.
W. H. WILLIAMS,
A. T. STOVALL,
R. E. WILBURN,
T. C. KIMBROUGH.

Dear Fellow Member of the Mississippi Bar:

The idea of a unified, self governing, democratic, Bar organization, including every lawyer in the state, is fast growing in favor, has received the endorsement of the American Bar Association and is already enacted into law in a number of states.

This is the proposed act for Mississippi, championed by the State Bar Association and is the result of careful study by an able committee.

To the lawyers is committed the trust of operating the judicial department of government and from this arises certain unavoidable moral and patriotic obligations.

Heretofore we have had the responsibility and frequently the blame, but now we are openly assuming the responsibility and asking that we be clothed with the organization and authority necessary to its discharge without which criticism of us is in a large measure unjust. We ask that we be governmentally recognized and organized with the avowed purpose of taking upon ourselves the task of bettering and keeping better the administration of justice.

To afford facilities for this, the act provides the organization machinery included in which is provision for necessary committees and commissions for the continuous study of courts, pleading and practice, substantive law, local conditions, practices elsewhere, etc., so that in time by such studies and comparisons we will develop a body of experts whose recommendations will be worthwhile, who will be abreast of changing conditions and whose opinions will be based on intimate knowledge both of our own peculiar conditions and also the experience of others. It is provided that their recommendations are to be made to the Legislature.

It is thought to create a new status between Bar and Legislature so that these two agencies may better work together for the public good.

It is clear to me that such an organization is capacitated to render great and continuous service, if we, its members, but have the needed spirit and purpose.

It affords the machinery whereby those falsely accused may be vendicated; those found actually guilty after careful investigation and trial may be purged, it being provided that no lawyer can be disbarred except after trial and judgment of the highest court of the state.

I ask your approval and support.

I suggest that your local Bar have a meeting with the legislators from your county, so that all may become familiar with its purposes and provisions.

I feel sure that no lawyer who approves of the measure will object to the small dues of five dollars a year, which income is necessary if the organization is to function.

With good wishes for you personally and professionally, I beg to remain,

Sincerely yours,

W. W. VENABLE,

President, Mississippi Bar Association.

AN ACT TO PROVIDE FOR THE ORGANIZATION, REGULATION AND GOVERNMENT OF THE MISSISSIPPI STATE BAR, TO REQUIRE ALL LAWYERS NOW OR HEREAFTER PRACTICING LAW WITHIN THIS STATE TO BECOME MEMBERS OF THE ASSOCIATION CREATED HEREUNDER, AND TO DEFINE THE POWERS AND DUTIES OF SUCH ASSOCIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI THAT: Section 1. The resident lawyers now authorized to practice law in the State of Mississippi are hereby and herewith constituted an association which shall be known as the Mississippi State Bar.

Section 2. After the passage of this act and the organization of the Mississippi State Bar as herein provided all resident persons now or hereafter admitted to practice law in this state shall be members of this association.

Section 3. The association created hereby shall be controlled and governed by a Board of Commissioners consisting of as many members as there are circuit court districts in the state. And when the president of the association shall not be an elected member of the board the number of members shall be one more than the number of circuit court districts.

Section 4. Within thirty (30) days after this act shall become effective each circuit judge, from the lawyers resident in his district, shall appoint one who is in good standing as a member of the Board and shall certify his appointment to the secretary of state. The persons thus appointed shall constitute the first Board of Commissioners and each shall hold office for one year from the date of the organization meeting provided for in the next succeeding section hereof and until his successor is elected in the manner hereinafter provided.

Section 5. When the secretary of state shall have received certificates of appointments of members from all of the districts, or at the end of thirty (30) days from the effective date of this act even though all certificates of appointment have not been received, he shall notify the persons whose appointments have been certified of an organization meeting to be held at his office at a time to be fixed by him, not less than ten (10) days and not more than 3 weeks from the date of such notice. Such notice shall be sent by mail, postage prepaid, to each appointee at his known postoffice address. At the time and place designated in the said notice the appointees shall meet and organize the Mississippi State Bar by electing a president, who may or may not be one of the appointed commissioners, a first vice-president, a second vice-president, and a secretary. At each meeting the Board of Commissioners may fix the salary of the secretary and may adopt by-laws, rules and regulations under which the business of the association shall be conducted until the first meeting of the Mississippi State Bar as hereinafter provided for. The president and vice-presidents elected by the Board at such or-

ganization meeting shall hold office until the first meeting of the association and until their successors are duly elected. The secretary shall be elected by the Board and hold office for the same term as commissioners do.

Section 6. At the organization meeting held under the last preceding section a majority of the appointed members shall constitute a quorum for all purposes. And at all meetings of the Board of Commissioners a majority of the entire membership shall constitute a quorum for action upon any questions that may come before the Board except such questions as this statute or the by-laws of the organization may require to be passed upon by a larger portion of the membership.

Section 7. The secretary elected at the meeting held under section 5 hereof shall at once proceed to make rolls which shall contain the name and place of residence of every lawyer in the state. He may adopt such means as he thinks best to make the rolls accurate and complete. There shall be made a separate roll for each circuit court district.

Section 8. The secretary shall also perform the duties of treasurer. He shall make bond for the safe handling of all funds for which he may become responsible, the bond to be in such penalty, with such sureties, and conditioned as the Board of Commissioners may require.

Section 9. The secretary shall keep minutes of all meetings of the Board of Commissioners and such minutes, signed by the chairman and secretary, shall be the evidence of the proceedings had and actions taken by the Board. He shall also keep the minutes of each meeting of the State Bar which minutes signed by him and by the presiding officer shall be evidence of the proceedings had and actions taken by the association.

Section 10. The secretary shall maintain his office at the State Capitol. But the meetings of the Board of Commissioners shall be at such places as the Board may select from time to time or as may be designated in calls made as herein authorized. The first meeting of the State Bar shall be at the State Capitol but subsequent meetings shall be held at such places as the State Bar may from time to time select. The secretary shall attend all meetings of the Board and all meetings of the State Bar.

Section 11. The secretary shall receive a salary in such amount and payable in such manner as the Board of Commissioners may prescribe from time to time. No other officer shall be paid a salary. But the traveling expenses of members of the Board attending meetings of the Board and such expenses of committees making trips on business of the association shall be paid.

Section 12. Enrollment on the list of members of this association and the payment of annual dues as required hereby shall be prerequisites to the continued practice by any lawyer already admitted and to the engaging in the practice by persons hereafter admitted. The date on which the provisions of this section shall

become operative will be determined in the manner hereinafter provided.

Section 13. Any lawyer changing his residence from one circuit to another shall promptly notify the secretary who shall make the changes on his rolls to show such person's name on the roll of the proper district.

Section 14. Each member of the association engaged in the practice, or in order to possess authority to practice law in this state, shall pay dues each year in the sum of $5.00. All dues shall be paid for the same period, that is, for the period of one year beginning on the day and month to be determined as in section 26 hereof provided. The dues shall be paid to the secretary of the association.

Section 15. Persons licensed to practice law but retired, or, for any reason, not engaged in the practice may become members; as also may the judges of the supreme court, and circuit, chancery and county judges. The payment of dues shall be optional with persons of the classes enumerated in this section, but they shall have all rights of other members of the association except that no judge shall be eligible to membership on the Board of Commissioners.

Section 16. The president shall preside at all meetings of the association, and shall have such duties as the association may by its by-laws prescribe. In his absence, or in case of his inability to perform his duties they shall devolve upon the first vice-president; and in the absence or inability to act of the first vice-president the duties of the president shall be performed by the second vice-president.

Section 17. The president, whether one of the elected members of the Board of Commissioners or not, shall be a member and ex-officio the chairman of the said Board. In case he is absent from any meeting of the Board some other member of the Board shall be selected by the members in attendance to preside at that meeting.

Section 18. A vice-president may be at the same time a member of the Board of Commissioners.

Section 19. Vacancies in any office, including the office of commissioner, shall be filled by the Board of Commissioners and any person so elected by the Board of Commissioners to fill a vacancy shall hold for the balance of the term of his immediate predecessor in office.

Section 20. If any member of the Board shall be absent from three successive meetings thereof, unless the reason for his absence shall be temporary illness, the Board may declare his office vacant and proceed to fill it as provided in the last preceding section.

Section 21. At the annual meeting of the State Bar the members from each district shall separately assemble and elect the member for their district for the ensuing term. Members of the association not attending the meeting may at any time

prior thereto send to the secretary of the association his vote in substantially the following form:

"I hereby cast my ballot for.....as a member of the Board of Commissioners from this the.....circuit court district of Mississippi for the ensuing term.

This the.....day of.....,.....

(Signed) .....

All such ballots so received by the secretary shall, prior to the time for the election of members of the Board, be delivered to the persons designated by the president to receive such ballots and present them to the members from the respective districts at the time they assemble to make a selection. Such ballots shall be sent in a sealed envelope and delivered, sealed, by the secretary. The number of the district shall be indicated on the outside of the envelope. Such ballots shall be considered and counted just as if each of the voters were present in person and voting. The result of the election in each instance shall be publicly reported by the chairman of the meeting held by the members from each district. The members of each district may themselves determine whether the voting of those present shall be by ballot or otherwise, but in any event the ballots of absent members shall be counted and this too whether the persons for whom the ballots are cast have been nominated or not. And if there are several ballots or votings the ballots of absent members shall continue to be cast as long as the persons they support are still in the contest.

Section 22. The State Bar shall be governed by the Board of Commissioners which shall have the powers and duties in this act conferred and which shall be charged with the executive functions of the State Bar and with the duty to enforce the provisions of this act. But the Board of Commissioners shall observe general rules, not in conflict with the provisions of this act, adopted in the form of by-laws or otherwise by the association.

Section 23. 1. The Board shall, subject to the approval of the justices of the supreme court, formulate rules governing the conduct of all persons admitted to practice.

2. It shall investigate and pass upon all complaints which shall be made concerning the professional conduct of any person who has been, or who may be hereafter admitted to the practice of law; and subject to the approval of the justices of the supreme court, shall formulate rules concerning reinstatement of members of the Bar who have been disbarred or suspended, and pass upon all petitions for reinstatement and make recommendations to the court in respect thereto.

3. In the performance of the duties imposed and in the execution of the powers vested the Board of Commissioners may appoint committees and delegate to such committees the power and authority possessed by the Board itself. But the authority

to pass upon the conduct of attorneys and to take action against or discipline attorneys may not be by the Board delegated to a committee. In such matters, however, committees may be authorized to make investigations and take evidence as is contemplated by other sections of this statute.

4. The Board of Commissioners shall render advisory opinions, upon the written request of any member of the association, as to the validity or propriety of any proposed act or course of conduct.

Section 24. 1. It shall be the duty of the Mississippi State Bar, by and through its president, to recommend to the state legislature such legislation relating to the courts, to matters of pleading, practice and procedure, and any other legislation which in its judgment will improve the courts and the law, or render the members of the Bar more efficient as ministers of justice and the courts more efficient as instrumentalities for its attainment.

2. The association shall have the right to make rules and by-laws not in conflict with any of the terms of this act concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the Board and of the State Bar.

3. The association shall have the authority to hold and conduct educational and social meetings and activities among the members of the Bar, to publish journals and generally to do such things as in their judgment may tend to improve the educational and ethical standing of the bench and bar.

Section 25. Nothing in this act contained shall repeal or supplant any statute or law or rule of court defining or prescribing offenses of attorneys or regulating their conduct or providing remedies or procedures against attorneys charged with wrongdoing, but the provisions hereof shall be treated as cumulative insofar as they define offenses or establish rules of conduct and provide remedies and procedure to deal with complaints or charges against attorneys. This association shall have no jurisdiction of complaints based upon acts done or committed prior to the effective date hereof.

Section 26. Any member failing to pay any dues after the same become due, and after two months' written notice of his delinquency mailed to him by registered mail, addressed to his usual place of abode, shall thereby stand suspended from membership in the Mississippi State Bar. It shall be the duty of the secretary, upon any member becoming suspended as above stated, to notify the courts of the county of his residence of such fact, viz: the circuit court, the chancery court and the county court if there be a county court, by mailing such notice to the presiding judge and to the clerk of such court to notify the delinquent in writing of his suspension. Any member shall be reinstated upon payment of delinquent dues and the secretary, upon such payment, shall forthwith notify the courts above mentioned of

such fact and the clerks thereof shall file and preserve such notice.

Upon satisfactory showing to the court that delinquent dues have been paid such court may authorize a suspended member to proceed with matters ready for hearing pending receipt of notice of reinstatement. The first year for which dues shall be paid shall begin on the date of the organization meeting of the first Board of Commissioners provided for in section 5 hereof. That date shall fix the beginning and ending of the association year for which dues are paid. Dues for the first year may be paid at any time after the organization meeting of the Board, but the secretary shall not demand such payment until after the first meeting of the association to be called and held as herein provided. The two months' delinquency for which a penalty is provided in this section shall begin to run from the date of notification given to each member by the secretary after the first meeting of the association as herein provided for. In subsequent years the date from which such two months shall be computed shall be the date on which the secretary makes his demand after the beginning of the association year.

Section 27. If there shall be lodged with the Board of Commissioners a complaint or charge that any member of the Mississippi State Bar has been guilty of a violation of the criminal laws of the state, or a violation of the rules of conduct promulgated by the association with the approval of the justices of the supreme court, or if knowledge shall otherwise come to the members of such violation, and it shall appear to the Board that there is reasonable ground for such complaint or charge the Board shall take cognizance thereof. It may require any person preferring a charge to furnish substantial support thereof. The Board shall have power to appoint a committee to take evidence on any such matter and deliver the same to the Board. In all such cases involving suspension or disbarment testimony therein shall be taken at the court house of the county of the residence of the party charged unless such party and the committee taking the evidence shall agree upon some other place; and the evidence of witnesses residing outside of the county may be taken in the same manner as provided by law for the taking of depositions in civil cases. At least ten days' notice in writing shall be given to the party charged of the time and place of taking evidence. The party whose interests are involved shall likewise be permitted to take evidence upon like notice to the chairman of the committee of the time and place of taking evidence. In all cases in which the evidence, in the opinion of a majority of the Board, justifies such a course, the Board shall take disciplinary action by public or private reprimand or otherwise as the case shall in their judgment warrant. In case the evidence, in the judgment of the Board, shows such delinquency as should require the suspension or disbarment of the party charged then the Board shall make its findings and recommendation to that effect. But the

Board shall make no final order thereon, but shall cause a transcript of all the evidence and proceedings taken and had in the case, duly certified by the secretary of the Board, to be filed with the clerk of the supreme court within thirty days from the date of the Board's decision. The clerk of the supreme court shall issue process for the party whose interest is involved, returnable as process for appellees in that court, and thenceforth the procedure shall be as in other cases on the docket of that court subject to the power of the court to promulgate special rules applicable to such matters. The supreme court shall, on the record submitted, decide and adjudge whether the party charged is guilty or not and if guilty what the penalty shall be and impose the penalty.

Section 28. The Board of Commissioners shall in no case give notice of a public hearing without having previously and privately given the party whose interests are involved an opportunity to explain or make amends or to satisfy the Board that he is guilty of no wrongdoing or that the complaint against him, or his delinquency, if any should be dealt with without a public hearing.

Section 29. If complaint is made of the conduct of any member of the Board, or if any member thereof is a party to the preferment of charges against any member of the association such member shall be disqualified from sitting as a member of the Board on the hearing of such charges. And any member may recuse himself when for good and sufficient reasons he deems himself prejudiced for or against a person charged. And a member may be required by the Board or by a party to a hearing before the Board to withdraw from the present hearing in cases of kinship or personal interest such as should ordinarily disqualify a judge to try a case.

Section 30. The Board of Commissioners shall have no authority to regulate the fees or charges of lawyers for the rendition of their professional services. Nor shall it in any way undertake to regulate such fees or charges.

Section 31. In investigation of charges of professional misconduct the Board, and any committee appointed by it for the purpose shall have power to summon and examine witnesses under oath and compel their attendance and the production of books, papers, documents and other writings necessary or material to the inquiry. Such summons or subpoena shall be issued under the hand of the Secretary of the Board or the chairman of any duly constituted committee, and shall have the force of a subpoena issued by a court of competent jurisdiction, and it shall be the duty of any person so summoned to appear and testify as in the writ commanded and to produce the books, papers and documents required, and any witness or other person who shall refuse or neglect to appear in obedience thereto, or who shall refuse to be sworn or testify or produce books, papers, documents or other writings demanded shall be guilty of a mis-

demeanor and upon conviction in any court having jurisdiction of the offense shall be fined not more than $500.00 or sentenced to the county jail not more than six months.

Section 32. Any member of the bar complained of shall have notice and opportunity to defend by the introduction of evidence and the examination of witnesses called against him, and the right to be represented by counsel. He shall also have the right to require the secretary to summon witnesses to appear and testify or produce books, papers, documents or other writings necessary or material to his defense in like manner as above provided for procuring the attendance and testimony of witnesses against him.

Section 33. Subpoenas and notices issued by the secretary or by the chairman of any committee at any hearing held under the provisions of this act shall be delivered to the sheriff of the county where they are to be executed and the sheriff shall serve such writs and notices, or cause them to be served, as he is required to do with respect to writs received by him from courts of record. An officer receiving any writ or notice for execution from another county shall have the right to demand the payment in advance of his fees which shall be the same as he would be entitled to if the writ or notice in question had been issued from a court record.

Section 34. The Board shall, by rules provided for such purpose and out of the funds herein provided for, arrange for the payment of fees for the summoning of witnesses and the payment of their fees, which fees shall be the same in amount as provided by law in civil cases in the circuit court.

Section 35. The Board of Commissioners selected as in section 4 hereof provided shall within 60 days from the date of its organization meeting call a meeting of the State Bar to be held at the State Capitol on a date not less than 30 days and not more than 60 days from the date of the call. Such call shall be signed by the president and secretary and shall be published as the Board in its order may direct. Every lawyer in the State of Mississippi and admitted to practice in this state shall be entitled to participate in the proceedings at such meeting and to vote on all questions that may come before it. At such meetings the president elected by the Board of Commissioners at the organization meeting shall preside. The association shall elect a president, a first vice-president and a second vice-president for a term of one year, which year shall not be coincident with the year for which members of the Board are elected. The year for which the president and the vice-presidents are elected shall be fixed by the by-laws so as to make such years end at the date that may be adopted for the annual meetings of the association. At such first meeting the association shall adopt by-laws for its government, providing for committees through which the activities of the association will be carried on, fixing the time for annual meetings of the association and of the Board of Commissioners, prescribing the manner in which special meetings of the Board and

of the association may be called and held, and covering other proper subjects, such by-laws not to be inconsistent with the provisions of this act. The president shall not be eligible to succeed himself.

Section 36. Section 3713 and Section 3714 of the Mississippi Code, 1930, are hereby repealed.

Section 37. This act shall take effect from and after its passage.

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NOTE: The names and addresses of all other officers, committeemen, and members of the Mississippi State Bar Association are contained in the August, 1931, issue of the JOURNAL.

NOTE AND COMMENT

A Foxy Statute.—The question discussed below was actually submitted for solution by a client of a well-known practitioner in Jackson. The lawyer's answer to the query, in the form of a memorandum opinion, resulted in obtaining a dismissal of the charge against his client—without a trial.

For those who have a penchant for unique legislation the opinion is quoted in full:

"The accused is charged with the unlawful killing of one fox (the species does not appear to be stated in the affidavit), in the manner hereinafter shown. According to all the witnesses, the accused observed the fox in the act of making a hostile demonstration toward certain fowls that had inadvertently strayed from the immediate vicinage of the home of accused to the fringe of a wooded plot hard by.

"That the motives of the fox were sinister appears beyond question. Like Cassius, he had 'a lean and hungry look,' and it was evident that he entertained no purpose of benevolence.

"The fox had obtained no permit to visit upon the lands of the accused and was at best a trespasser *quare clausum fregit* with specific intent to become *vi et armis* if the occasion arose. He lost his ancient title of fox *ferae naturae* when his errant pawsteps led him into the close of the accused.

"The courts take judicial knowledge of the well-known and universally accepted fact of a fox's nature; he is untrustworthy, clandestine, stealthy in his methods; dark and devious are his ways. It might be that the principles, *fraus est odiosa et non praesumenda,* and *fraus et dolus nemini patrocinari debent,* could be applied in determining whether an offense has been committed.

"At any rate, all these things must have been in the legislative mind when Section 4722 of the Mississippi Code of 1930 was enacted. In part, this statute is as follows:

> "Open seasons and bag limits.—The open season and bag limits on game shall be as follows:
>
> "Fox: It shall be unlawful to chase a fox with hounds, or allow hounds to kill same in chase, from September 1st to March 1st of the next year; however, it shall be unlawful to scare, drive, force, or dig a fox out of the ground, or to scare, force, knock, or shoot a fox out of a tree, or to fell a tree, or to fell a tree on which or in which a fox has taken refuge."

"The proof in this case will undoubtedly show that the accused shot the fox while he (the fox) was *on the ground.* We have been unable to find any statute prohibiting the killing of a fox on *terra firma.* That is to say, the legislature, in its wisdom, has seen fit to protect foxes while *in* or *on trees* and *in the ground,* but not while *upon the ground.* It is true that a difference of a few feet may mean considerable to the fox insofar as his safety under the law is concerned, but it may also mean considerable to an accused charged with his death.

"Foxes can, like humans, be in, on or above the ground. The legislature has promised him immunity so long as he stays *off* the ground and has thrown an elaborate protection around him. *But,* let him stray out of a tree or out of his hole and — Presto! Get him if you can! And the fox in this instance was got.

"While the statute is aimed at the protection of wild animals and game and its validity is unquestioned as an exercise of the police power of the state, yet it is also a highly penal and criminal statute and must be strictly construed.

"Therefore, my opinion is that even though the accused may have been justified in taking life because of the hip movement of the fox toward the

helpless fowls, this defense is wholly unnecessary for he cannot be held answerable for crime except upon the showing that he violated a positive law which defines the crime with which he is charged. Whether justification may be interposed as a defense is pretermitted by the finding that, in fact, no crime whatsoever has been committed.

"A man is a man for a' that and a' that. A fox is a fox for that and other things as well. As between the two stand the servants of the sovereign people. If, in the attempt to protect the one the legislature inadvertently shields the other, there is no remedy save at the ballot box. There have been more serious public issues than fox and anti-fox settled at the sacred polls but possibly none more vital to those immediately concerned.

"For the above reasons the accused is entitled to his discharge."

With kindest personal regards, I am,

Sincerely, your friend,

HARRY M. BRYAN.

THE POWER TO AMEND THE CONSTITUTION OF THE UNITED STATES.—This article presents the writer's views as to the important and interesting subject of the doubtful power, beyond certain limits, to amend the Constitution of the United States.

It will be seen that the only express limitations in the Constitution on the power to amend, which will be referred to later, are stipulated in Article Five. They are as follows: First, prior to 1808, no amendment shall be adopted prohibiting the migration and importation of slaves; second, prior to 1808, no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration provided for in the Constitution; third, no state, without its consent, shall be deprived of its equal representation in the Senate. The first two were restrictive temporarily only; the last is a permanent prohibition.

The Ninth Amendment is as follows: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." These two amendments are a part of the bill of rights, and are generally considered as being virtually a part of the original Constitution. Indeed, several of the states ratified the Constitution only on the understanding that these amendments, or others embodying the same principles, would be adopted. The question immediately presents itself, in view of these amendments: Have the people the power, under the Constitution, to adopt other amendments delegating to the United States powers which are expressly reserved to the states by the Ninth and Tenth Amendments?

A short statement of the gist of the several amendments will disclose that only five of them (possibly six, if the Sixteenth is included) take away powers reserved in the states; the others enlarge on the provisions of the Constitution, but do not detract therefrom. The first eight amendments enumerate rights expressly reserved to the people. The Ninth and Tenth Amendments, quoted above, are express reservations of all rights to the states, and to the people of the states, not expressly granted to the United States by the Constitution, nor prohibited by it to the states. The Eleventh Amendment is the exposition of an ambiguous clause of the Constitution, relating to the jurisdiction of the

Federal Courts in suits brought by one of the states. The Twelfth Amendment simply changes the method of electing the President and Vice President; it takes no power away from the states.

The Thirteenth, Fourteenth, and Fifteenth Amendments, referring to the abolition of slavery and the right of the negro to vote, were the first which detracted from the powers of the states, expressly reserved thereto by the Ninth and Tenth Amendments. These amendments were deemed by the victorious North to be necessary war measures. The southern states, the only ones opposed to their adoption, were in no position to object at this critical period of our history.

The Sixteenth Amendment, it would seem, was contemplated by the framers of our Constitution. The Supreme Court of the United States had decided that a tax on an income, partially derived from land, was a direct tax, which is prohibited by the Constitution. But the Constitution provides that no amendment shall be passed permitting Congress to lay a direct tax *prior to 1808*, thus implying that such an amendment could be adopted subsequent to that date. The Seventeenth Amendment changes the mode of election of the United States Senators, providing for their election by popular vote, whereas the original Constitution provided that they be elected by the state legislatures. Omitting for the moment the Eighteenth Amendment, toward which this discussion is principally directed, it is obvious that the Nineteenth Amendment, granting women the right of suffrage, is also a detraction from state powers. But it has dawned upon us that women are rather as well mentally equipped as men. At any rate, we have grown accustomed to, and no longer mind, their assertion and exercise of the right to vote.

The Eighteenth Amendment, providing against the manufacture, sale, transportation, importation, and exportation of intoxicating liquors is the first and only one that has disturbed the popular mind to the extent that a great many people have asked themselves the question: Does the power exist in the people, by means of amendment, to detract from the powers reserved to the states by the Constitution, and delegate the same to the United States?

The United States government was the first of a dual form. The states were in existence as sovereign powers before the adoption of the Constitution. By mutual agreement, in the Constitution, the states delegated certain powers, theretofore exercised by themselves, to the United States. All powers not so delegated were impliedly reserved in the states by the Constitution proper, and expressly so reserved by the Ninth and Tenth Amendments. We have at all times recognized the sovereignty of the states. But if three-fourths of the states can, by united action, take away state powers, can it be said that the minority of the states, relinquishing these powers against their wills, are sovereignties? Can it be said that a power is supreme, if by concerted action other sovereignties can compel it to submit to laws which it has reserved the power to pass or not pass, according to its discretion? The very existence of the states depends upon their retaining the powers reserved to them by the Ninth and Tenth Amendments.

It is submitted that amendments to the Constitution which take away powers reserved by that instrument in the states serve to tear down the fundamentals of our system of government. If the power exists to destroy a part of the Constitution, why does it not exist, by analogy, to adopt an amendment rendering the entire Constitution void and of no effect, and set up an entirely

new form of government? If one single principle of our Constitution can be destroyed by amendment, then it necessarily follows that the whole can be so destroyed.

The Thirteenth, Fourteenth, Fifteenth, Eighteenth, and Nineteenth Amendments take away powers expressly reserved by the Ninth and Tenth Amendments to the states. Every bit as logically, the Twentieth Amendment might take away all the powers of the states, against the will of one-fourth of them, and set up an absolute monarchy.

Article Five of the Constitution sets up the machinery for adopting amendments. It might, with some force, be argued that since this Article places certain specific limitations on the power to amend, then the framers of the Constitution impliedly meant that any amendment, not specifically prohibited in the Article, could be adopted. But by a universal rule, no part of an instrument can be considered as standing alone, but must be construed with a thought to the whole instrument. Is it possible that the framers meant, for example, that the clauses providing against ex post facto laws and bills of attainder could be abolished by amendment? "A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument." Story on the Constitution, Sec. 1508. Roger Sherman said in the First Congress, "All that is granted us by the Fifth Article is, that whenever we shall think it necessary we may propose Amendments to the Constitution; not that we may propose to repeal the old, and substitute a new one." In other words, the "power to amend" connotes the power to add to, not the power to destroy.

By the Fifth Article, the states cannot be deprived of equal representation in the Senate by amendment. If one of the rights of the states can be destroyed by amendment, then it follows that all the rights and the states themselves can be so destroyed. Then the express prohibition on the amending power will have been overcome by amendment, for the states will not have equal representation in the Senate.

It is certain that the Eighteenth Amendment was never dreamed of by the framers of our Constitution. Before the Constitutional Convention convened, the delegates from Pennsylvania and Virginia, with possibly a few others, attended a dinner at the home of Benjamin Franklin, and it is thought that more drinking than dining followed. At least one cask of Madeira wine was consumed. James M. Beck, formerly Solicitor General of the United States, has said, in his book, The Constitution of the United States, that if the members of the Constitutional Convention had known that the Eighteenth Amendment would be adopted, they would have adjourned sine die. Benjamin Franklin, without whom we would probably have never had a Constitution, once said, "I wish it were possible to invent a method of embalming drowned persons in such a manner that they may be called to life at any period, however distant; for, having a very urgent desire to see and observe the state of America a hundred years hence, I should prefer to any ordinary death being immersed in a cask of Madeira wine with a few friends till that time, to be then recalled to life by the solar warmth of my dear country." If this venerable man is, per chance, now in a position to see this country which he loved so well, as it has been affected by the adoption and enactment of the Eighteenth Amendment and laws under it, and the futile efforts made to enforce them, he has no doubt been turning in his grave since 1918.

On principle, it would seem to the writer that we had no power under the Constitution to adopt the Eighteenth Amendment. If this be true, then for the purpose of preserving that wonderful instrument which has welded our country into the greatest nation of the world, it would be a wise policy to repudiate it as quickly as possible. Laws which are so averse to the popular mind that they are virtually unenforceable, retard progress, rather than promote it.

Many Americans think this country acted hastily in adopting the Eighteenth Amendment; now, the problem confronts us, how are we to get rid of it? An attempt to answer this question is beyond the scope of this article.

Also, no effort has been made to present the cogent moral and financial reasons for repealing the amendment.

J. BENNETT TRULY.

RIGHT OF LESSOR TO FORFEIT OIL OR GAS LEASE CONTINUING "FOR SO LONG A TIME AS OIL OR GAS SHALL BE PRODUCED IN PAYING QUANTITIES" UPON FAILURE OF LESSOR TO MARKET THE GAS PRODUCED.—A recent case passed upon by the Supreme Court of Louisiana presents a question, which, though presented in very few instances in the past will undoubtedly be of vital importance in Mississippi and all other states which are just beginning the development of their oil and natural gas resources. The following abbreviated statement of "*Smith vs. Sun Oil of Louisiana,*" the case to which above reference is directed, presents this question and sets out the most recent decision of the Louisiana Supreme Court on the matter.

The plaintiff, Smith leased to the defendant a tract of land for "so long a time as oil or gas should be produced thereon in paying quantities." The defendant developed the land by boring two wells, which, combined produced from one-half million to a million feet of gas per day. But the fact is, there was no market for the gas and the plaintiff lessor brought suit to obtain a forfeiture of the lease on the ground that it had expired by its own terms in that the well no longer produced gas or oil in paying quantities.—The holding of the court, citing in support thereof past decisions, was in effect that, "Oil well or gas well producing gas which is not being readily marketed is not producing gas in paying quantities." In the opinion the court follows with the statement: "Where the output of a well either cannot be, or in fact is not disposed of, the well cannot be said to be a paying proposition either for the owner of the land or the owner of the well, and, where a well has ceased to be a paying proposition for anyone concerned it has clearly ceased to produce gas in paying quantities. We think the lease has expired by its very terms."

Thus, the Louisiana court disposes of the matter definitely and with language indicative of simplicity in their regard for the question. It does not follow, however, that the proposition has been so regarded in the other jurisdictions in which it has been met. To the contrary, the adjudications on the matter are very discordant as the following enumeration of authorities will show. In presenting them the writer will not attempt to show upon which side the weight of authority lies, but as a matter of suggestion rather than argument, would state as his opinion that due to the fact that the question is a novel one upon which a decision might best be reached through local

experience, greater respect should be paid to the decisions of those states in which oil and gas resources have had their earliest and most expansive development, and where questions similar in principle if not in fact are of common occurrence.

Ruling Case Law states: "When a producing gas well is developed but its product is not marketed, that fact alone does not authorize the lessor to forfeit the lease,[1] unless the failure has continued for an unreasonable length of time.[2]

A Texas court supports this view to an even further degree and in a case involving a similar state of facts, (*Little vs. Stephens,* 1 S. W. 2nd. 353) holds: "Assignee of a lessee under a continuing lease so long as gas was produced in paying quantities was judge of whether gas was so produced."

The leading cases on this matter are undoubtedly the McGraw Case (Cited in note above) and the Summerville Case, 56 A. 876. The former case announces the principle that when a producing gas well is developed but its product not marketed, that fact does not authorize the lessor to forfeit the lease; the lessee being willing to pay the agreed sum for the gas well. The latter case follows with the decision that, "as a matter of law the lessor had no right to forfeit the lease because no gas had been marketed, where the evidence showed that a well on the land produced 1,000,000 feet of gas per day, worth, when conveyed to a market from three to five cents per foot.

These two cases were decided in 1909 and 1904 respectively, thus they present the foundation for adjudications on this question in that the principle has not been passed upon at an earlier date. The following cases are later cases involving similar facts. Investigation discloses that they are in absolute conformity with the above cases, cited in note below.[3]

The cases cited above constitute the best authority on the question but another text published at a comparatively recent date treats with the subject and will be considered here "*Summers on Oil and Gas.*" In this work Mr. Summers attempts to show that a distinction is made by the courts in disposing of cases of this identical nature between leases involving gas producing wells and those producing oil. He states, "If a lessee drills wells within the exploratory period and discovers oil in sufficient quantities for profitable production, but caps the well or wells and does not actually produce it, the lease will terminate at the end of the definite term, even though the excuse for non-production be that a profitable market was not available." (Citing here *McGraw Oil & Gas Co. vs. Kennedy,* 64 S. E. 1027.) On the other hand, some cases seem to hold that if the lessee drills the well or wells, and does not produce the gas therefrom, his lease is not terminated at the end of the exploratory period, within the rule above stated, provided the lessee pays or tenders the stipulated gas well rent. (Citing here *Summerville vs. Appollo Gas Co.*)

An investigation and study of those cases will show that such a distinction is not made by the courts deciding them. Both cases, in fact, deal solely with the question of the interpretation of a lease in regard to gas. Nor does the

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1 McGraw Oil Co. vs. Kennedy, 64 S. E. 1027, 28 L. R. A. 959.
2 Collins vs. Mt. Pleasant Oil Co., 118 Pac. 54, 38 L. R. A. 134.
3 Rotch vs. Junction Oil & Gas Co., 179 Pac. 934.
b. Note in 38 L. R. A. 135.
c. Hennessy vs. Junction Oil & Gas Co., 182 P. 666.
d. Harness vs. Eastern Oil Co., 38 S. E. 662.

court in its opinion pass upon the case in recognition of a distinction between the law as applied to gas and that as applied to oil. From those two cases it is seen that the same interpretation is placed upon leases involved in controversies which involve questions in regard to oil producing wells as are placed upon gas producing wells. An examination of all other adjudications in this same matter will show that such a distinction has never been made. Thus, the authorities herein cited, though dealing in fact with leases wherein gas wells are involved, may be taken as authority in controversies wherein oil producing wells are the basis of the issue, since the courts do not adhere to the distinction attempted by the above author.

B. O. MOUNGER.

BOOK REVIEW

WHAT PRICE JURY TRIALS. By Irving Stalmaster: The Stratford Company, Publishers, Boston, Mass.

Another attack is made on trial by jury—this time by one qualified to speak, Irving Stalmaster, Assistant Attorney General of Nebraska. Mr. Stalmaster confines his discussion to jury trials in civil cases.

In the beginning of his book, he quotes a humorous verdict returned by a Texas jury: "We, the jury, find in favor of the plaintiff for the amount of the note and interest sued for. And we further find in favor of the defendant on his plea of the Statute of Limitations. And all of the jury join in recommending both parties to the mercy of the court."

With clearness and directness the writer compares the efficiency of the equity court with the uncertainties of a jury trial. In showing the lack of reason for the restrictions imposed upon a law judge, he points out that: "One day as an equity judge it is within his power to try and fully determine cases involving accounting and settlement which may run into thousands of dollars; or establish and foreclose a mortgage or lien on highly valuable real estate holdings. . . . On the morrow while sitting as a judge in a law case where a person is sued for $200 due on an account, he is not allowed to be the judge of the matter, but must have a jury determine the question involved."

Mr. Stalmaster believes that none of the reforms advocated can make the jury as efficient as our equity judge. This discussion, coming from one familiar with the subject, is a worthwhile addition to those criticisms of our jury trial.

NELSON CAUTHEN.